

Nos. 13-17102, 13-17154

IN THE  
**United States Court of Appeals  
For The Ninth Circuit**

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FACEBOOK, INC.,  
*Plaintiff-Appellee,*

v.

POWER VENTURES, INC.

&

STEVEN SURAJ VACHANI,  
*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Northern District of California  
Case No. 5:08-cv-05780-LHK, The Honorable Lucy Koh

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**SUPPLEMENTAL EXCERPTS OF RECORD  
VOLUME II OF II**

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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
 California corporation; POWER VENTURES, INC.  
 a Cayman Island Corporation, STEVE VACHANI,  
 an individual; DOE 1, d/b/a POWER.COM, an  
 individual and/or business entity of unknown nature;  
 DOES 2 through 25, inclusive, individuals and/or  
 business entities of unknown nature,

Defendants.

Case No. 5:08-CV-05780 JW

**DEFENDANTS' MEMORANDUM  
 OF POINTS AND AUTHORITIES IN  
 OPPOSITION TO FACEBOOK'S  
 MOTION FOR PARTIAL  
 SUMMARY JUDGMENT UNDER  
 CALIFORNIA PENAL CODE § 502  
 AND THE COMPUTER FRAUD  
 AND ABUSE ACT, 18 U.S.C. § 1030**

Date: January 23, 2012  
 Time: 9:00 a.m.  
 Courtroom 9 – 19<sup>th</sup> Floor  
 Chief Judge James Ware

### III. THE CFAA AND CALIFORNIA PENAL CODE § 502

The CFAA is primarily a criminal statute, criminalizing and penalizing unauthorized access to computers. *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*, 428 F.3d 504, 510 (3d Cir. 2007). The majority of CFAA cases involve “classic” hacking activities. *Id.*; see also *LVRC Holding LLC v. Brekka*, 581 F.3d 1127, 1130 (9th 2009) (“The act was originally designed to target hackers who accessed computers to steal information or to disrupt or destroy computer functionality as well as criminals who possessed the capacity to ‘access and control high technology processes vital to our everyday lives.’”).

Facebook claims that defendants violated two provisions of the CFAA. First, Facebook relies on 18 U.S.C. § 1030(a)(2)(C), which prohibits a party from intentionally accessing a computer “without authorization” and thereby obtaining “information from any protected computer.” Facebook also cites 18 U.S.C. § 1030(a)(4), which prohibits a party from accessing a “protected computer” “without authorization” with “intent to defraud” and “by means of such conduct furthers the intended fraud and obtains anything of value.” See also *P.C. Yonkers, Inc.*, 428 F.3d at 508 (“A claim under CFAA § 1030(a)(4) has four elements: (1) defendant has accessed a ‘protected computer;’ (2) has done so without authorization or by exceeding such authorization as was granted; (3) has done so ‘knowingly’ and with ‘intent to defraud;’ and (4) as a result has ‘further[ed] the intended fraud and obtain[ed] anything of value.’”).

Penal Code § 502 is California’s corollary to the CFAA. *Multiven, Inc. v. Cisco Systems, Inc.*, 725 F.Supp.2d 887, 895 (N.D. Cal. 2010). It was enacted to expand the degree of protection to individuals, businesses and government agencies from “tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems.” Penal Code § 502(a). As the Court held in its July 20, 2010 order, each of the subsections of Penal Code § 502 that potentially apply in this case require that defendants’ actions be taken “without permission.” 7/20/10 Order at 9. Individuals may only be subjected to liability for acting “without permission” under the statute if they “access[] or us[e] a computer, computer network, or website in a manner that overcomes technical or code-based barriers. *Id.* at 18. Facebook also bears the burden to prove that it suffered “damage or loss” because of defendants’ actions.

**V. THE COURT SHOULD DENY FACEBOOK'S MOTION FOR SUMMARY JUDGMENT ON ITS PENAL CODE § 502 CLAIM**

Facebook also moves for summary judgment as to its claim under Penal Code § 502 on the same grounds as its claim under the CFAA. As with its CFAA claim, Facebook has failed to show that Power accessed Facebook's website "without permission." *See supra* Section IV.B. Facebook has also failed to establish any harm to its network or data from any of Power's activities. And Facebook has failed to establish that Power intended to defraud Facebook. The Court should deny Facebook's motion for summary judgment on its Section 502 claim.

**VI. CONCLUSION**

Facebook has failed to satisfy its burden to establish every factual element of its claims under the CFAA or Penal Code § 502. In fact, Facebook is unable to demonstrate that defendants have caused any harm to it in any way. The Court should deny Facebook's motion for summary judgment on its claims under the CFAA and Penal Code § 502.

Dated: December 2, 2011

BURSOR & FISHER, P.A.

By:                     /s/                      
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## EXHIBIT 2

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FACEBOOK, INC. :

Plaintiff, :

v. :

:

POWER VENTURES, INC. d/b/a:

POWER.COM, a California :

corporation; POWER :

VENTURES, INC. a Cayman :

Island Corporation, STEVE :

VACHANI, an individual; :

DOE 1, d/b/a POWER.COM, an:

individual and/or business:

entity of unknown nature; :

DOES 2 through 25, :

inclusive, individuals :

and/or business entities :

of unknown nature, :

Defendants. :

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

04:42 1 thing. It's initiated by the user, that's what we  
04:42 2 know.

04:42 3 Q. The automated script, though, is  
04:42 4 operated by power.com?

04:42 5 A. It's a -- An automated script for  
04:42 6 PowerScript, are initiated by users and executed by  
04:42 7 power.com in the same way that an exporter is  
04:43 8 initiated by user and managed by the site that's  
04:43 9 doing it on behalf of the user. Did you get that?  
04:43 10 Yes.

04:43 11 (Whereupon, Exhibit 107 is marked  
04:43 12 for identification by the reporter.)

04:43 13 Q. Mr. Vachani, Exhibit 107 is  
04:43 14 Exhibit A to the first amended complaint that was  
04:43 15 106. Have you seen this document before today?

04:43 16 A. What is this document I'm looking  
04:43 17 at?

04:43 18 Q. Exhibit A to the first amended  
04:43 19 complaint.

04:43 20 A. Is this the Facebook Terms and  
04:43 21 Conditions?

04:43 22 Q. Yes.

04:44 23 A. I have -- Vaguely -- I've seen  
04:44 24 this before, yes. I don't know if I've seen this  
04:44 25 specific version. I've read the Facebook Terms and



04:44 1 Conditions previously.

04:44 2 Q. As of December 1st, 2008, had you  
04:44 3 read the Terms and Conditions that were available  
04:44 4 on the Facebook Web site?

04:44 5 A. I didn't read it all a hundred  
04:44 6 percent, but we had read -- people in our company  
04:44 7 had read it.

04:44 8 Q. So who in your company had read it  
04:44 9 -- if anybody?

04:44 10 A. It would have been myself -- I  
04:44 11 believe -- I do remember reading it. Filipe would  
04:44 12 have also read it.

04:44 13 Q. Mr. Herrera?

04:44 14 A. Yes. I would have asked was there  
04:44 15 anything relevant in the terms. He would have been  
04:44 16 the person I talked to.

04:44 17 Q. Could you turn to Page 4?

04:44 18 A. Sure.

04:44 19 MR. BURSOR: Are you using the  
04:44 20 page numbers at the top?

04:44 21 MR. COOPER: Yes. I'm sorry if  
04:44 22 that wasn't clear.

04:44 23 Q. Mr. Vachani, your counsel made a  
04:45 24 good point. I'm referring to the page numbers in  
04:45 25 the upper right-hand corner. You see the one that

04:45 1 says Page 415?

04:45 2 A. Yes.

04:45 3 Q. Can you read the first bullet  
04:45 4 point to yourself and tell me when you've finished?

04:45 5 A. The first bullet point? Yes.

04:45 6 Okay.

04:45 7 Q. As of December 1st, 2008, do you  
04:45 8 know one way or another whether anybody at Power  
04:45 9 had read that particular provision in the Facebook  
04:45 10 Terms of Service?

04:45 11 A. Yes.

04:45 12 Q. Had you read it?

04:45 13 A. Yes.

04:45 14 Q. All right. Did you have an  
04:46 15 understanding whether power.com enabled users to  
04:46 16 registered users to violate the Terms of Service?

04:46 17 A. I don't understand how a message  
04:46 18 that a user wants to send to another friend --  
04:46 19 First of all, it's an unsolicited message; and  
04:46 20 second, I don't understand what this Terms and  
04:46 21 Conditions has anything to do with -- with -- I  
04:46 22 don't understand how the relevance to the  
04:46 23 questions.

04:46 24 Q. Did you have an understanding  
04:46 25 whether or not power.com to enabled its registered

04:49 1 2008, have an understanding whether it was  
04:49 2 permitting registered users of Facebook to violate  
04:49 3 the Terms of Service of Facebook?

04:49 4 A. I don't know -- I'm not at liberty  
04:49 5 to say what -- what's a violation of Facebook's  
04:49 6 terms and we -- As I already stated, we did not  
04:49 7 participate in sending any kind of unsolicited  
04:49 8 users and our users were sending messages to their  
04:49 9 own friends, so I don't understand if a user sends  
04:49 10 a message to their friend how that's unsolicited  
04:49 11 and how that has anything to do with this  
04:49 12 terminology.

04:49 13 Q. Would you look at the third bullet  
04:49 14 point?

04:49 15 A. Yeah.

04:49 16 Q. You see where it says -- if you  
04:49 17 read the -- It starts with, "In addition, you agree  
04:49 18 not to use the service or site to," and then the  
04:49 19 third bullet point is, "use automated scripts to  
04:49 20 collect information from or otherwise interact with  
04:50 21 the service or the site."

04:50 22 THE WITNESS: Scott, is this even  
04:50 23 relevant to the conversation? I don't -- I don't  
04:50 24 understand.

04:50 25 MR. BURSOR: Why don't we just get

04:50 1 the question read back and then just answer the  
04:50 2 question.

04:50 3 A. So what's the question?

04:50 4 (Whereupon, the last question is  
04:50 5 read back by the reporter.)

04:50 6 MR. BURSOR: Is the question:  
04:50 7 Does he see that in the agreement?

8 MR. COOPER: Yeah, that's all I  
9 asked.

10 MR. BURSOR: Yeah, so do you see  
04:50 11 that -- do you see that --

04:50 12 A. I see that in the agreement.

04:50 13 MR. BURSOR: Yeah, so then you've  
04:50 14 answered the question.

15 A. Okay. Yeah, I see that in your  
04:50 16 agreement.

04:50 17 Q. Have you read that language as of  
04:50 18 December 1st, 2008?

04:50 19 A. Yes. I had read it many times.

04:50 20 Q. Had anybody else at power.com read  
04:50 21 that language as of December 1st, 2008?

04:50 22 A. I don't know if they read it. It  
04:51 23 was my job to read it and I think Filipe probably  
04:51 24 read it. Those are the two people that I know.

04:51 25 Q. As of December 1st, 2008, had you

05:38 1 remember any substantial conversation.

05:38 2 Q. All right. Do you know -- The  
05:38 3 second sentence of Exhibit 109 says, "Eric we need  
05:38 4 to be prepare for Facebook to try and to block us  
05:38 5 and the turn this into a national battle that gets  
05:39 6 us huge attention"?

05:39 7 A. Yes.

05:39 8 Q. Why did you think Facebook was  
05:39 9 going to block you?

05:39 10 A. Obviously, they sent this letter  
05:39 11 to us saying very clearly it was -- I thought it  
05:39 12 was absurd, but that -- nonetheless that they were  
05:39 13 trying to do this, but it was clear that that's  
05:39 14 what they would do.

05:39 15 Q. By what the way, do you remember  
05:39 16 the name of the Facebook individual that Nevo  
05:39 17 suggested you talk to?

05:39 18 A. I do not recall it right mow.

05:39 19 Q. Do you know if it was the same Sam  
05:39 20 O'Rourke?

05:39 21 A. That name sounds familiar, but I  
05:39 22 don't -- I know I've heard that name.

05:39 23 Q. Why did you -- The third sentence  
05:39 24 says, "We need to address the scraping argument and  
05:39 25 the soliciting log in credentials"?

05:50 1 A. Yes. We were -- We were live all  
05:50 2 the way until we voluntarily took it down once --  
05:50 3 once the communications once it broke down we made  
05:50 4 a decision that we'll voluntarily take it down and  
05:50 5 we'll implement Facebook Connect anyway, even  
05:50 6 though Facebook was being very, you know, difficult  
05:50 7 to work with we said -- we made the decision that  
05:50 8 we'll go ahead and implement Facebook Connect. It  
05:50 9 was not going to happen -- it was not a simple --  
05:50 10 We realized that it was not going to happen in a  
05:50 11 simple way, but we did take it down and we launched  
05:50 12 Facebook Connect which you're probably aware of  
05:50 13 that we did turn on Facebook Connect.

05:50 14 Q. Did fate Facebook block access to  
05:51 15 its site?

05:51 16 A. To what?

05:51 17 Q. At any point, did you become aware  
05:51 18 that Facebook was attempting to block access from  
05:51 19 Power to the site?

05:51 20 A. I don't know if they were --  
05:51 21 Obviously, we expected that they would but he we  
05:51 22 also know that our system doesn't get blocked  
05:51 23 because there's nothing -- there's nothing it's  
05:51 24 technically doing. It's just users accessing the  
05:51 25 site so that it can't really be blocked. The

05:51 1 system can't be -- you can't -- Unless you want to  
05:51 2 block your users from entering your site, Power's  
05:51 3 technology is just implementing -- just emulating  
05:51 4 what users are wanting to do, so there was no  
05:51 5 really conversation about whether they were going  
05:51 6 to be blocked. We know that they would try, but we  
05:51 7 also know that it was built to -- it would not be  
05:51 8 blockable.

05:51 9 Q. You see in the final page there's  
05:51 10 a reference, second page, "We did study Digsby and  
05:51 11 others and saw the changes they made to their UI to  
05:52 12 implement Facebook Connect"?

05:52 13 A. Yes.

05:52 14 Q. Do you know what Digsby is?

05:52 15 A. Digsby was a company that Facebook  
05:52 16 was aggressively threatening legally that was  
05:52 17 aggregating accounts.

05:52 18 Q. Do you know if -- When you say "we  
05:52 19 did study Digsby" what study was made of Digsby?

05:52 20 A. We evaluated what they -- what  
05:52 21 they originally did and then how they implemented  
05:52 22 Facebook Connect and just to -- because we knew at  
05:52 23 that time it was a -- one of the many, many, sites  
05:52 24 that Facebook was threatening.

05:52 25 Q. Is there any document reflecting

## C E R T I F I C A T I O N

I, PATRICIA MULLIGAN CARRUTHERS, a  
Certified Shorthand Reporter and Notary Public of  
the State of New Jersey and a Notary Public of the  
State of New York, do hereby certify that prior to  
the commencement of the examination the witness was  
sworn by me to testify as to the truth, the whole  
truth, and nothing but the truth.

I do further certify that the foregoing is  
a true and accurate transcript of the testimony as  
taken stenographically by and before me at the  
time, place, and on the date hereinbefore set  
forth.

I do further certify that I am neither of  
counsel nor attorney for any party in this action  
and that I am not interested in the event nor  
outcome of this litigation.



Patricia Mulligan Carruthers, CSR  
Certificate No. XI00780  
Notary Public of the State of New York  
Notary Public of the State of New Jersey

Dated: JULY 27, 2011

My commission expires October 28, 2015 (N.J.)  
My commission expires December 21, 2013 (N.Y.)



## EXHIBIT 4

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor (*pro hac vice*)  
369 Lexington Avenue, 10<sup>th</sup> Floor  
New York, NY 10017  
Telephone: (212) 989-9113  
Facsimile: (212) 989-9163

BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP  
Alan R. Plutzik (State Bar No. 077785)  
L. Timothy Fisher (State Bar No. 191626)  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598  
Telephone: (925) 945-0200  
Facsimile: (925) 945-8792

Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

Defendants.

Case No. 5:08-cv-05780 JF (RS)

**DEFENDANT POWER VENTURES,  
INC.'S RESPONSES TO  
FACEBOOK, INC.'S FIRST SET OF  
REQUESTS FOR ADMISSIONS**

**REQUEST FOR ADMISSION NO. 13:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU provided POWER USERS with the means to access the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

Admitted.

**REQUEST FOR ADMISSION NO. 14:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU solicited FACEBOOK USER login information, including, but not limited to, user login names, e-mail addresses OR passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

Objection vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 15:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU stored FACEBOOK USER login information, including, but not limited to, user login names, e-mail addresses OR passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 15:**

Admitted.

**REQUEST FOR ADMISSION NO. 16:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used the FACEBOOK WEBSITE for commercial purposes.

**RESPONSE TO REQUEST FOR ADMISSION NO. 16:**

Denied.

/ / /

/ / /

**REQUEST FOR ADMISSION NO. 17:**

Admit that YOU have never entered into a formal advertising agreement with FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

Objection vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 18:**

Admit that YOU developed OR created programming scripts OR language that would provide POWER with an automated mechanism to extract data from the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 18:**

Admitted.

**REQUEST FOR ADMISSION NO. 19:**

Admit that YOU copied OR made use of at least some part, excerpt, OR portion of FACEBOOK's source code to develop, test implement, use OR provide POWER's aggregating services.

**RESPONSE TO REQUEST FOR ADMISSION NO. 19:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 20:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU incorporated FACEBOOK WEBSITE content, DATA, or information into the POWER WEBSITE OR that services located thereon.

**RESPONSE TO REQUEST FOR ADMISSION NO. 20:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

/ / /

**REQUEST FOR ADMISSION NO. 21:**

Admit that in or about December 2008, YOU agreed to access the FACEBOOK WEBSITE OR cause others to access the FACEBOOK WEBSITE through means permitted by FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 21:**

Admitted.

**REQUEST FOR ADMISSION NO. 22:**

Admit that after receiving notice that YOUR use of or access to FACEBOOK was not permitted by FACEBOOK, YOU took, copied, OR made use of DATA from the FACEBOOK WEBSITE without FACEBOOK'S permission to do so.

**RESPONSE TO REQUEST FOR ADMISSION NO. 22:**

Admitted.

**REQUEST FOR ADMISSION NO. 23:**

Admit that FACEBOOK implemented technical measures to block YOU from accessing the FACEBOOK WEBSITE through the POWER WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 23:**

Admitted.

**REQUEST FOR ADMISSION NO. 24:**

Admit that, in or about December 2008, FACEBOOK blocked YOUR IP address(es) from accessing the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 24:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

/ / /

/ / /

**REQUEST FOR ADMISSION NO. 36:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used or attempted to another person's FACEBOOK WEBSITE account information without authorization from FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 36:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 37:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used automated scripts or COMPUTER CODE to collect information from, or otherwise interact with, the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 37:**

Admitted.

**REQUEST FOR ADMISSION NO. 38:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU uploaded, posted, OR made available promotional materials OR solicitations on the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 38:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 39:**

Admit that on December 26, 2008, Steve Vachani sent an e-mail to Facebook stating YOUR "business decision" to continue accessing or using the FACEBOOK WEBSITE without implementing the Facebook Connect platform.

**RESPONSE TO REQUEST FOR ADMISSION NO. 39:**

Objection vague and ambiguous. Subject to and without waiving these objections, Power admits that Mr. Vachani sent an email to Facebook's counsel on December 26, 2008 stating:

Dear Joseph,  
I am writing to follow up to our discussions regarding Power.com's integration of Facebook connect, your requests for us to take down

**REQUEST FOR ADMISSION NO. 54:**

Admit that, between December 1, 2008 and February 1, 2008, YOU did not delete the "Facebook friend information" in YOUR possession.

**RESPONSE TO REQUEST FOR ADMISSION NO. 54:**

Admitted.

**REQUEST FOR ADMISSION NO. 55:**

Admit that, to present date, you have not deleted, purged or destroyed all data that YOU obtained from the FACEBOOK network.

**RESPONSE TO REQUEST FOR ADMISSION NO. 55:**

Admitted.

**REQUEST FOR ADMISSION NO. 56:**

Admit that, to present date, you have not deleted, purged or destroyed all FACEBOOK login information obtained from POWER users, including, but not limited to, FACEBOOK user names and/or passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 56:**

Admitted.

Dated: December 15, 2010

BRAMSON, PLUTZIK, MAHLER &  
BIRKHAEUSER, LLP

By \_\_\_\_\_/s/  
L. Timothy Fisher

Alan R. Plutzik (State Bar No. 77785)  
L. Timothy Fisher (State Bar No. 191626)  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598  
Telephone: (925) 945-0200  
Facsimile: (925) 945-8792

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor (*pro hac vice*)  
369 Lexington Avenue, 10<sup>th</sup> Floor  
New York, NY 10017-6531  
Telephone: (212) 989-9113  
Facsimile: (212) 989-9163

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Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani



## EXHIBIT 6



## Fwd: Cease and Desist Soliciting Login Credentials and Scraping Facebook Content

1 message

steve@stevevachani.com <steve@stevevachani.com>

Mon, Feb 9, 2009 at 12:12 PM

Reply-To: steve@stevevachani.com

To: scott@bursor.com

Cc: felipe.herrera@corp.power.com

--- On Mon, 12/1/08, [steve@stevevachani.com](mailto:steve@stevevachani.com) <[steve@stevevachani.com](mailto:steve@stevevachani.com)> wrote:

From: [steve@stevevachani.com](mailto:steve@stevevachani.com) <[steve@stevevachani.com](mailto:steve@stevevachani.com)>

Subject: Fwd: Cease and Desist Soliciting Login Credentials and Scraping Facebook Content

To: "Felipe Herrera" <[felipe.herrera@powerinc.net](mailto:felipe.herrera@powerinc.net)>, "Eric Santos" <[eric.santos@powerinc.net](mailto:eric.santos@powerinc.net)>

Date: Monday, December 1, 2008, 8:01 PM

We need to prepare and think carefully how to transform this into an opportunity for Power. I will talk to my friends at Meebo and also see the best response.

Eric, we need to be prepared for Facebook to try to block us and the turn this into a national battle that gets us huge attention. But before we do that, we need to be prepared to address their arguments.

We need to address the scraping argument and the soliciting login credentials. Soliciting login credentials should be something with A LOT of precedent. Everybody has been soliciting login credentials for years. Scraping is also something we should be able to address.

Let's discuss this. This is exciting. :)

Keep this letter confidential.

Thanks.  
Steve

--- On Mon, 12/1/08, [hostmaster1@poweremail.org](mailto:hostmaster1@poweremail.org) <[hostmaster1@poweremail.org](mailto:hostmaster1@poweremail.org)> wrote:

From: [hostmaster1@poweremail.org](mailto:hostmaster1@poweremail.org) <[hostmaster1@poweremail.org](mailto:hostmaster1@poweremail.org)>

Subject: Fwd: Cease and Desist Soliciting Login Credentials and Scraping Facebook Content

To: "Steven Vachani" <[steve@stevevachani.com](mailto:steve@stevevachani.com)>

Cc: "Felipe Herrera" <[felipe.herrera@powerinc.net](mailto:felipe.herrera@powerinc.net)>

Date: Monday, December 1, 2008, 7:54 PM

Steve,

This looks serious. They want a response by Wednesday in writing.  
If I can help, let me know.

Leigh Power

--

Power Assist, Inc.  
Coupeville, WA 98239  
--

----- Forwarded message from [JCutler@perkinscoie.com](mailto:JCutler@perkinscoie.com) -----

Date: Mon, 1 Dec 2008 19:30:08 -0800  
From: "Cutler, Joseph P. (Perkins Coie)"  
<[JCutler@perkinscoie.com](mailto:JCutler@perkinscoie.com)>  
Reply-To: "Cutler, Joseph P. (Perkins Coie)"  
<[JCutler@perkinscoie.com](mailto:JCutler@perkinscoie.com)>  
Subject: Cease and Desist Soliciting Login Credentials and Scraping Facebook  
Content  
To: [hostmaster1@poweremail.org](mailto:hostmaster1@poweremail.org)

I misspelled your email address when I sent this earlier this evening. Please see below.

Sincerely,

Joe

Joseph P. Cutler  
Attorney at Law  
Perkins Coie, LLP  
206.359.6104 (Office)  
206.359.7104 (Fax)  
[jcutler@perkinscoie.com](mailto:jcutler@perkinscoie.com)

-----Original Message-----

From: Cutler, Joseph P. (Perkins Coie)  
To: '[hostmaster1@poeremail.org](mailto:hostmaster1@poeremail.org)' <[hostmaster1@poeremail.org](mailto:hostmaster1@poeremail.org)>  
CC: McCullagh, James R. (Perkins Coie); Demetrescu, Nicole (Perkins Coie)  
Sent: Mon Dec 01 18:51:00 2008  
Subject: Cease and Desist Soliciting Login Credentials and Scraping Facebook  
Content

<<C&D power.com.pdf>>  
Please open, review and respond to the attached correspondence as directed therein.

Sincerely,

Joe

Joseph P. Cutler | Perkins Coie LLP

Attorney at Law  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
[jcutler@perkinscoie.com](mailto:jcutler@perkinscoie.com) <<mailto:jcutler@perkinscoie.com>>

206.359.6104 (office) | 206.359.7104 (fax)

Professional Biography


<[http://www.perkinscoie.com/professionals/professionals\\_detail.aspx?professional=139](http://www.perkinscoie.com/professionals/professionals_detail.aspx?professional=139)>


NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.


IMPORTANT TAX INFORMATION: This communication is not intended or written by Perkins Coie LLP to be used, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code of 1986, as amended.

----- End forwarded message -----

### 3 attachments

 **ATT142348.txt**  
2K

 **ATT142351.htm**  
3K

 **C&D power.com.pdf**  
173K

HIGHLY CONFIDENTIAL  
ATTORNEYS' EYES ONLY

POWER 2011.02.03.0000090

## EXHIBIT 7

Case 1:13-cv-01554 Document 126-2 Filed 11/19/23 Page 23 of 258

**From:** Eric Santos <eric.santos@corp.power.com>  
**Sent time:** Thursday, December 18, 2008 2:30:29 AM  
**To:** SteveVachani <steve@stevevachani.com>  
**Subject:** RES: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT

---

Ok.

Lembrando que a prioridade número 1 é a correção de bugs e melhorias na infra-estrutura (inclusive ficar pronto para bloqueios). A número 2 é a melhoria na campanha e comunicação para maximizar a ação. A 3ª prioridade está em desenvolver a solução do Facebook Connect e a solução de Integração de Redes (evitar que a gente fique com o usuário e senha).

Abraço

Eric

---

**De:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Enviada em:** quinta-feira, 18 de dezembro de 2008 05:22  
**Para:** Eric Santos  
**Assunto:** Re: RES: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT

Ok. Hopefully Facebook will give us an extension to keep Facebook working while we work on this new solution. I will need to present a presentation to Facebook with our product plan and progress on this. Hopefully we will be able to keep the site working while we do this and keep improving Facebook.

Also, during this time, we can make sure that our Amazon solution is working to distribute IP's through Amazon and other places.

Thanks,

Steve

--- On Wed, 12/17/08, Eric Santos <eric.santos@corp.power.com> wrote:

From: Eric Santos <eric.santos@corp.power.com>  
Subject: RES: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT  
To: "SteveVachani" <steve@stevevachani.com>  
Date: Wednesday, December 17, 2008, 11:09 PM

Bruno não está envolvido nessa atividade, somente a Carol. Para que se comece a especificação vou precisar que o Carlos Bacelar termine o estudo. Como te falei vamos ter que tirar o facebook e manter o site por enquanto sem facebook ... já vou solicitar que eles trabalhem para que a Power.com fique pronta para estar sem o Facebook e aguardarei a sua confirmação.

Atc,

Eric

---

**De:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Enviada em:** quinta-feira, 18 de dezembro de 2008 04:31  
**Para:** Eric Santos; Felipe Herrera; Bruno Carvalho; Eric Santos  
**Cc:** Cornelius Conboy  
**Assunto:** Re: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT

Eric, after Carole and Bruno finish the initial specifications and designs, please provide me a Power point showing visually how everything will work with this new version. I will take this to Facebook to show them our progress and work for them to provide additional time.

Please keep me updated.

Thanks,  
Steve

--- On Wed, 12/17/08, steve@stevevachani.com <steve@stevevachani.com> wrote:

Case 1:15-cv-00600-1 Document 126-2 Filed 11/19/23 Page 38 of 258

From: steve@stevevachani.com [mailto:steve@stevevachani.com]  
Subject: Re: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT  
To: "Eric Santos" <eric@power.com>, "Felipe Herrera" <felipe.herrera@corp.power.com>, "Bruno Carvalho" <bruno.carvalho@corp.power.com>, "Eric Santos" <eric.santos@corp.power.com>  
Cc: "Cornelius Conboy" <cornelius.conboy@corp.power.com>  
Date: Wednesday, December 17, 2008, 10:22 PM

Eric, if we make a lot of progress on the presentation and other parts of the implementation, I will return to Facebook and make a presentation with our product plan and implementation and ask them if they can give us an extra week. Do not REMOVE it without talking to me. Please be ready to remove it if necessary.

Please let me know after Carol and Bruno finish the full product presentation of how it will work.

Thanks,  
Steve

--- On Wed, 12/17/08, Eric Santos <eric.santos@corp.power.com> wrote:

From: Eric Santos <eric.santos@corp.power.com>  
Subject: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT  
To: "SteveVachani" <steve@stevevachani.com>, "Eric Santos" <eric@power.com>, "Felipe Herrera" <felipe.herrera@corp.power.com>, "Bruno Carvalho" <bruno.carvalho@corp.power.com>  
Cc: "Cornelius Conboy" <cornelius.conboy@corp.power.com>  
Date: Wednesday, December 17, 2008, 8:07 AM

Steve,

Realisticamente NÃO conseguiremos implantar a Facebook Connect na Power.com até o dia 24. Só posso garantir até essa data a retirada do PowerSite Facebook da Power.com. Além disso, não temos equipe com esse conhecimento específico. Estou colocando dedicado 100% do tempo nessa atividade o Carlos Bacelar, mesmo assim não vai ser suficiente para que a gente tenha alguma solução pronta antes do ano que vem.

Temos os seguintes etapas que devemos passar para fazer algo com Facebook Connect:

- 1- Estudar o Facebook Connect e realizar um estudo comparativo com a nossa tecnologia. Verificar o que poderemos fazer e o que não poderemos. [Carlos Bacelar]
- 2- Desenvolver projeto do novo powersite do Facebook com Facebook Connect na Power.com. [Carolina Fialho]
- 3- Desenvolver infra-estrutura para acessar o Facebook Connect. [Carlos Bacelar]
- 4- Desenvolver a integração do powersite do Facebook Connect na Power.com. [Elmo – Tyago e Leandro]

\*Ainda temos o esforço de retirada da atual solução.

Ou seja, se contente se essa solução estiver no ar antes do dia 15 de janeiro. Infelizmente não acho indicado parar as atividades de correção de bug e melhoria de performance.

Posso tentar te confirmar a retirada do facebook da Power.com no dia 24. Perderemos aproximadamente 30k usuários. Ok?

Atc,

Eric

---

**De:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Enviada em:** quarta-feira, 17 de dezembro de 2008 09:28  
**Para:** Eric Santos; Felipe Herrera; Bruno Carvalho  
**Cc:** Cornelius Conboy  
**Assunto:** Integrating new changes regarding Facebook, Facebook Connect - URGENT

Eric,

Please see [www.joost.com](http://www.joost.com), [www.digsby.com](http://www.digsby.com), and some other sites that have integrated Facebook connect.

On the first page, we will put a Login Using Facebook approved logo. Please see the approved logos. When a person clicks that, it will popup the Facebook connect login.

We can customize the text and graphics. Please see how Joost implemented this.

After the person logs in, We can use their Facebook photo with the Facebook logo inside (see Joost). We can also access the Facebook IM inside our Facebook messenger.

Please confirm if we can access updates, Facebook mail, birthdays, and other information on the start page.

Facebook allows the option for a user to remain logged in to a site with their Facebook account.

So if a Power Facebook user returns, we can go automatically to their logged in start page. We can also let Facebook users automatically have a Power account and we can store all their other accounts inside of Power.

We might need to create a separate window for Facebook inside of the Power Start page, but lets see if we can integrate the information more naturally inside.

In the short term, lets be Facebook's most INNOVATIVE partner and then when we are ready, I will request for them to give us more flexibility and allow us to create extensions to Facebook connect.

I don't like to do this, but I think in the short term, we should try. We are not strong enough right now.

Also, if a user enters Facebook, for now, we should just keep a Power Frame open and then past them into Facebook. The user will need to login. If they have a Facebook cookie, they will not need to login. Let's try to keep the Power Frame.

Maybe we can still use the Power Proxy also if Facebook allows us to stay logged in. Let's try to to see if we can use the proxy.

I realize that this is a big change, but it is important that we try our best. Diplomatically, this will allow us to have more flexibiliy to try new things with Facebook,

Facebook has given us a deadline to have EVERYTHING installed and working by next week. We need to complete everything by December 24th.

Let me be clear. THIS IS VERY URGENT.

Let's determine the best possible user experience.

We will not let users login right now directly.

In the short term, we will integrate Facebook Connect inside our Power Login API also.

We will need to follow Facebook connects policies regarding displaying their logo on our site. They have approved logos and other stuff at this link

1. That Power.com has ceased displaying Facebook's trademarks on its website, except as expressly permitted by Facebook's Terms of Use, Developer Terms of Service, and/or Facebook's Connect Policies (see [http://wiki.developers.facebook.com/index.php/Facebook\\_Connect\\_Policies](http://wiki.developers.facebook.com/index.php/Facebook_Connect_Policies)).
2. That Power.com has implemented Facebook Connect in strict adherence to Facebook's Terms of Use, Developer Terms of Service, and/or Connect Policies.

Eric, please study Facebook connect carefully and please look at Joost, Digsby, and other Facebook connect partners to see how they have implemented. More importantly, lets' try to be Facebook's most innovative partner so they will then work with us on new ideas.

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1853 - Release Date: 17/12/2008 08:31

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1853 - Release Date: 17/12/2008 08:31

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1854 - Release Date: 17/12/2008 19:21

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1854 - Release Date: 17/12/2008 19:21

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1854 - Release Date: 17/12/2008 19:21

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1854 - Release Date: 17/12/2008 19:21



**From:** Eric Santos <eric.santos@corp.power.com>  
**Sent time:** Thursday, December 18, 2008 2:30:29 a.m.  
**To:** SteveVachani <steve@stevevachani.com>  
**Subject:** RES: RES: RES: Integrating new changes regarding Facebook, Facebook Connect URGENT

---

Ok.  
Remember that the number 1 priority is the correction of bugs and the improvement of the infrastructure (including being ready for blocks). Number 2 is the improvement of the campaign and communication to maximize the action. The 3<sup>rd</sup> priority is to develop the Facebook Connect solution and the solution for the Integration of Networks (to keep us from having the username and password).

Hug

Eric

---

**From:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Sent date:** Thursday, December 18, 2008 5:22 a.m.  
**To:** Eric Santos  
**Subject:** Re: RES: RES: Integrating new changes regarding Facebook, Facebook Connect - URGENT

Ok.

Hopefully Facebook will give us an extension to keep Facebook working while we work on this new solution. I will need to present a presentation to Facebook with our product plan and progress on this. Hopefully we will be able to keep the site working while we do this and keep improving Facebook.

Also, during this time, we can make sure that our Amazon solution is working to distribute IP's through Amazon and other places.

Thanks,

Steve

---On **Wed, 12/17/08**, Eric Santos <eric.santos@corp.power.com> wrote:

From: Eric Santos <eric.santos@corp.power.com>  
Subject: RES: RES: Integrating new changes regarding Facebook, Facebook Connect URGENT  
To: "SteveVachani" <steve@stevevachani.com>  
Date: Wednesday, December 17, 2008, 11:09 p.m.

Bruno is not involved in this activity; only Carol. In order to begin the specification, I will need Carlos Bacelar to finish the study. As I already told you, we are going to have to remove Facebook and maintain the site without Facebook for now...I will request that they work so that Power.com is ready to be without Facebook, and I will await your confirmation.

Regards,

Eric

---

**From:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Sent on:** Thursday, December 18, 2008 4:31a.m.  
**To:** Eric Santos; Felipe Herrera; Bruno Carvalho; Eric Santos  
**Cc:** Cornelius Conboy  
**Subject:** Re: RES: Integrating new changes regarding Facebook, Facebook Connect URGENT

Eric, after Carole and Bruno finish the initial specifications and designs, please provide me a Power point showing visually how everything will work with this new version. I will take this to Facebook to show them our progress and work for them to provide additional time.

Please keep me updated.

Thanks,  
Steve

---On **Wed, 12/17/08**, steve@stevevachani.com <steve@stevevachani.com> wrote:

From: steve@stevevachani.com <steve@stevevachani.com>  
Subject: Re: RES: Integrating new changes regarding Facebook, Facebook Connect URGENT  
To: "Eric Santos" <eric@power.com>, "Felipe Herrera" <felipe.herrera@corp.power.com>, "Bruno Carvalho" <bruno.carvalho@corp.power.com>, "Eric Santos" <eric.santos@corp.power.com>  
Cc: "Cornelius Conboy" <cornelius.conboy@corp.power.com>  
Date: Wednesday, December 17, 2008, 10:22 p.m.

Eric, if we make a lot of progress on the presentation and other parts of the implementation, I will return to Facebook and make a presentation with our product plan and implementation and ask them if they can give us an extra week. Do not REMOVE it without talking to me. Please be ready to remove it if necessary.

Please let me know after Carol and Bruno finish the full product presentation of how it will work.

Thanks,  
Steve

---On Wed, 12/17/08, Eric Santos <eric.santos@corp.power.com> wrote:

From: Eric Santos <eric.santos@corp.power.com>  
Subject: RES: Integrating new changes regarding Facebook, Facebook Connect URGENT  
To: "SteveVachani" <steve@stevevachani.com>, "Eric Santos" <eric@power.com>, "Felipe Herrera" <felipe.herrera@corp.power.com>, "Bruno Carvalho" <bruno.carvalho@corp.power.com>  
Cc: "Cornelius Conboy" <cornelius.conboy@corp.power.com>  
Date: Wednesday, December 17, 2008, 8:07 a.m.

Steve,

Realistically we will NOT be able to implement Facebook Connect on Power.com until the 24<sup>th</sup>. Until that date, I can only guarantee the removal of the PowerSite Facebook from Power.com. In addition, we do not have a team with this specific knowledge. I am putting Carlos Bacelar to dedicate 100% time to this activity, even though it is not going to be sufficient for us to have a solution ready before next year.

We have the following stages that we need to go through to do something with Facebook Connect:

- 1 – Study Facebook Connect and realize a comparative study with our technology. Verify what we can and can't do. [Carlos Bacelar]
- 2 – Develop project of new powersite of Facebook with Facebook Connect on Power.com. [Carolina Fialho]
- 3 – Develop infrastructure to access Facebook Connect. [Carlos Bacelar]
- 4 – Develop the integration of the Facebook Connect powersite on Power.com. [Elmo – Tyago and Leandro]

\*We still have the effort to remove the current solution.

Or, rather, is it OK if this solution is live before January 15. Unfortunately I do not think it's appropriate to stop the bug correction activities and performance improvement.

I can try to confirm with you the removal of Facebook from Power.com on the 24<sup>th</sup>. We will lose approximately 30k users. OK?

Regards,

Eric

---

**From:** steve@stevevachani.com [<mailto:steve@stevevachani.com>]  
**Sent on:** Wednesday, December 17, 2008, 9:28 a.m.  
**To:** Eric Santos; Felipe Herrera; Bruno Carvalho  
**Cc:** Cornelius Conboy  
**Subject:** Integrating new changes regarding Facebook, Facebook Connect URGENT

Eric,

As we discussed, we will proceed to make changes to implement Facebook connect for the initial login and our start page.

Please see [www.joost.com](http://www.joost.com), [www.digsby.com](http://www.digsby.com), and some other sites that have integrated Facebook connect.

On the first page, we will put a Login Using Facebook approved logo. Please see the approved logos. When a person clicks that, it will popup the Facebook connect login.

We can customize the text and graphics. Please see how Joost implemented this.

After the person logs in, we can use their Facebook photo with the Facebook logo inside (see Joost). We can also access the Facebook IM inside our Facebook messenger.

Please confirm if we can access updates, Facebook mail, birthdays, and other information on the start page.

Facebook allows the option for a user to remain logged in to a site with their Facebook account.

So if a Power Facebook user returns, we can go automatically to their logged in start page. We can also let Facebook users automatically have a Power account and we can store all their other accounts inside of Power.

We might need to create a separate window for Facebook inside of the Power Start page, but lets see if we can integrate the information more naturally inside.

In the short term, lets be Facebook's most INNOVATIVE partner and then when we are ready, I will request for them to give us more flexibility and allow us to create extensions to Facebook connect.

I don't like to do this, but I think in the short term, we should try. We are not strong enough right now.

Also, if a user enters Facebook, for now, we should just keep a Power Frame open and then past them into Facebook. The user will need to login. If they have a Facebook cookie, they will not need to login. Let's try to keep the Power Frame.

Maybe we can still use the Power Proxy also if Facebook allows us to stay logged in. Let's try to see if we can use the proxy.

I realize that this is a big change, but it is important that we try our best. Diplomatically, this will allow us to have more flexibility to try new things with Facebook,

Facebook has given us a deadline to have EVERYTHING installed and working by next week. We need to complete everything by December 24th.

Let me be clear. THIS IS VERY URGENT.

Let's determine the best possible user experience.

We will not let users login right now directly.

In the short term, we will integrate Facebook Connect inside our Power Login API also.

We will need to follow Facebook connects policies regarding displaying their logo on our site. They have approved logos and other stuff at this link

1. That Power.com has ceased displaying Facebook's trademarks on its website, except as expressly permitted by Facebook's Terms of Use, Developer Terms of Service, and/or Facebook's Connect Policies (see [http://wiki.developers.facebook.com/index.php/Facebook\\_Connect\\_Policies](http://wiki.developers.facebook.com/index.php/Facebook_Connect_Policies)).

2. That Power.com has implemented Facebook Connect in strict adherence to Facebook's Terms of Use, Developer Terms of Service, and/or Connect Policies.

Eric, please study Facebook connect carefully and please look at Joost, Digsby, and other Facebook connect partners to see how they have implemented. More importantly, lets' try to be Facebook's most innovative partner so they will then work with us on new ideas.

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1853 Release Date: 17/12/2008 08:31

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1853 Release Date: 17/12/2008 08:31

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1854 Release Date: 17/12/2008 19:21

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1854 Release Date: 17/12/2008 19:21

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.552 / Virus Database: 270.9.19/1854 Release Date: 17/12/2008 19:21

No virus found in this outgoing message. Checked by AVG. Version: 7.5.552 / Virus Database: 270.9.19/1854 Release Date: 17/12/2008 19:21



# TRANSPERFECT

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SAN JOSE

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SEOUL

SINGAPORE

STOCKHOLM

STUTTGART

SYDNEY

TEL AVIV

TOKYO

TORONTO

VANCOUVER

WASHINGTON, DC

ZURICH

City of New York, State of New York, County of New York

I, Casey Dianni, hereby certify that the document:

- RES RES RES Integrating new changes regarding Facebook, Facebook Connect - URGENT - Eric Santos (eric.santos@corp.power.com) - 2008-12-18 0230

is, to the best of my knowledge and belief, a true and accurate translation from Portuguese to English.

*Casey M. Dianni*  
Casey Dianni

Sworn to before me this  
November 14, 2011

*Sarah E. Mullen*  
Signature, Notary Public



Stamp, Notary Public

## **EXHIBIT A**



1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
PHONE: 206.359.8000  
FAX: 206.359.9000  
www.perkinscoie.com

December 1, 2008

**SENT VIA EMAIL**

Power Assist, Inc.  
Attn: Leigh Power  
210 Kineth Point Place  
Coupeville, Washington 98239-9569

hostmaster1@poweremail.org

**Re: Cease and Desist Soliciting Login Credentials and Scraping Facebook Content**

Dear Ms. Power:

We represent Facebook Inc., based in Palo Alto, California. It has come to Facebook's attention that your company is soliciting and storing Facebook user login information, scraping content from Facebook, and sending unsolicited commercial messages to Facebook users through your website: <http://www.power.com>. These activities violated Facebook's Terms of Use, which specifically prohibit:

- Solicitation of Facebook user login information;
- Using or attempting to use another person's Facebook account without authorization from the Company;
- Use of automated scripts to collect information from, or otherwise interact with, the Facebook website;
- Uploading, posting, transmitting, sharing or otherwise making available any unsolicited or unauthorized advertising, solicitations, promotional materials, "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation;
- Using the Facebook service or site for commercial purposes, except under formal advertising programs offered by Facebook; and

LEGAL14988339. 1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MENLO PARK  
OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

Power.com  
December 1, 2008  
Page 2

- Incorporating any Facebook site content or information in any other database or compilation.

See <http://www.facebook.com/terms.php>.

In addition to breaching Facebook's Terms of Use, your website's functionality may violate the California Comprehensive Computer Data Access and Fraud Act, CA Penal Code § 502(c); the California Anti-Phishing Act of 2005, CA Bus. and Prof. Code § 22948, *et. seq.*; the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; the CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*; and state laws prohibiting interference with Facebook's business expectations and interests.

You are also displaying the Facebook trademark on your website without Facebook's authorization, which likely causes visitors to your website to incorrectly believe that your website is approved by or in some way affiliated with Facebook.

Facebook takes the protection of its users' privacy very seriously and is committed to keeping Facebook a safe place for users to interact and share information. Facebook has developed Terms of Use to protect its users and to facilitate these goals. As set forth above, your website violates Facebook's Terms of Use.

Facebook offers an open development platform that allows third parties to develop applications that integrate with Facebook, subject to Facebook's Developer Terms of Service. See <http://developers.facebook.com/terms.php> and <http://developers.facebook.com/guidelines.php>. You may also wish to familiarize yourself with "Facebook Connect," which allows Facebook users to connect their Facebook identity, friends and privacy to any site. For more information on Facebook Connect, please visit <http://developers.facebook.com>. These resources may allow you to integrate existing functionality with Facebook in an authorized manner.

Please respond to me in writing no later than close of business on Wednesday, December 3, 2008, confirming that you: (1) have ceased and desisted in, and will refrain from, soliciting, using and/or retaining Facebook user login information, or any other Facebook Site Content as defined by the Facebook Terms of Use, (2) ceased and desisted in, and will refrain from, sending any manner of unsolicited commercial messages to Facebook users; (3) removed compatibility with Facebook from your website, (4) removed references to Facebook from your website and other promotional material, (5) ceased using and/or displaying Facebook's trademark on your website and/or other promotional material, and (6) that in the future you and your company will strictly comply with Facebook's Terms of Use.



Power.com  
December 1, 2008  
Page 3

Very truly yours,

A handwritten signature in dark ink, appearing to read "Joe Cutler", with a stylized flourish at the end.

Joseph P. Cutler

JPC:jpc

LEGAL14988339. 1

SER 300

## **EXHIBIT B**

**Dalton, Amy**

---

**From:** steve@stevevachani.com  
**Sent:** Friday, December 26, 2008 9:50 PM  
**To:** felipe.herrera@powerinc.net; Cutler, Joseph P. (Perkins Coie)  
**Cc:** Demetrescu, Nicole (Perkins Coie); McCullagh, James R. (Perkins Coie); steve@power.com  
**Subject:** Power.com Update - sent December 26th, 2008

Dear Joseph,

I am writing to follow up to our discussions regarding Power.com's integration of Facebook connect, your requests for us to take down our current Power browser compatability with Facebook, and your complaints regarding our users storing their Facebook login information inside the Power Browser. I hope you will pass this letter on to Sam and other appropriate parties inside of Facebook to communicate our sincere desire to diplomatically resolve our current disagreement and help you reduce these disagreements with well intentioned companies like Power.

Power.com is very committed to working with Facebook and we sincerely hope that this message of diplomacy and good intention is very clear in this letter. We would like to reiterate that we have made the decision to make every diplomatic effort possible to cooperate with Facebook to integrate your Facebook Connect solution on our login page. We had originally expected that it would take us 2 weeks to complete this integration, but with the holidays and the amount of work necessary to complete this integration, we realistically don't expect have this new solution fully integrated until January 30<sup>th</sup> as we had previously discussed. After careful consideration and after previously thinking that it would better to take Facebook comptability down while we implemented this new solution, we have made the business decision to not prevent the interruption of service to our millions of users while working closely to make these changes to address Facebook's concerns. We sincerely hope that while this is not your desired action, you will respect our reasons for doing this and keep the door open and approve Power.com inside of Facebook connect when we go live in one month. Furthermore, we would like to work with Facebook to offer our complete browser tools to users with Facebook's consent and input into the user experience.

The Power.com browser provides our users value added features across their Internet experience. Like most browsers, we have little interest to cause harm to Facebook or reduce Facebook's revenues. On the contrary, we are taking proactive steps to pass all Facebook ads through to the user inside our browser. Similar to Firefox, Internet Explorer, Flock, and other browsers and browser add-ons, we provide our users a browser to navigate and continue to use their existing sites and do not in any way attempt to obstruct users from using the sites they are accustomed to using every day. Like most browsers, we do offer our users the option to either start their experience on our home page or start on their default social network.

Furthermore, we are about to launch a new solution which will pass Facebook ads inside of all Facebook content which is displayed outside of Facebook. This is something we can have ready by the end of January and which we can also enable for you to offer to other development partners whose only desire is to create positive applications for Facebook users. We are committed to working with the entire industry to responsibly create a borderless web where all parties interests are respected when widgets, apps, messages, and other content are distributed outside of Facebook or outside the host site of any other web publisher.

Power strives for complete transparency with our users by providing them explicit statements on our front page in two different places about the nature of our application, the fact that we are a value added browser with no endorsement by other sites, and we also require a user before using our service to read

through and proactively accept our terms and conditions where we for the third time clarify the users consent and understanding that we are in no way affiliated with or endorsed by Facebook.

We completely understand Facebook's position to not begin any business discussions with Power.com until we have become compliant with Facebook requests. We request that you please reconsider this decision and enable us to meet with Facebook as early as possible to diplomatically resolve this issue in a way that will allow us to keep creating new applications for Facebook and also help Facebook better accommodate other innovators and application developers like Power.com who only want to enrich your user's experiences. We are working to implement this complete solution with Facebook's cooperation by January 30<sup>th</sup> and sincerely hope that you will not misinterpret this delay and our decision to not interrupt the user experience of our mutual users as our lack of desire to work together with Facebook.

If you maintain that you cannot facilitate a direct meeting, we will happily use our own contacts to start these discussions with Facebook, but it is difficult to start these discussions until after the holidays are over. We have no problem using our own contacts to get to the appropriate people at Facebook engaged in discussions in January to resolve this, but naturally prefer your assistance to speed things up.

We believe that it would be a serious strategic mistake to disrupt the experience of the millions of Power.com users while we are actively working to complete the integration of Facebook connect. We believe that this would create unnecessary attention and disruption among users, the media, and the industry around what we believe is a discussion that can be handled maturely and quietly between our companies.

I believe that Facebook understands the current challenges as Meebo and soon thousands of other sites that will connect to Facebook using open source technology solutions and other user driven solutions that are not endorsed by Facebook. We respect Facebook's objectives to create an open Internet which respects and protects users and enables developers to create new innovations to serve Facebook users. We think that it is important that we all diplomatically work together to achieve these goals for the best interests of users. The borderless web is inevitable and we all need to work together to define the best practices for this new and exciting Internet which Facebook has already played such a pivotal role in helping create over the past years.

Power.com is very interested in sitting down with Facebook to discuss together the future of the borderless internet and work to address all of Facebook's concerns. I am willing to fly to San Francisco as early as possible to proactively present our solutions or we are happy to wait until after January 30<sup>th</sup> when we complete our integration of Facebook connect on our initial login page.

We believe that that your number one concern of protecting a users username and password will be resolved by our implementation of Facebook connect or by Facebook using an extension to Facebook connect that we would like to present to you which would allow Power and other outside developers maximum flexibility to innovate on top of Facebook while keeping the users username and password locked securely and safely outside the reach of Power.com or any other developer. We are currently supporting and helping introduce a new industry wide solution that will ensure that sites like Power.com, Meebo, eBuddy, and thousands of others will never have access or store Facebook usernames and passwords, but still have the maximum flexibility to innovate new applications on top of Facebook and all other sites on the Internet. We all share similar investors and partners and we are all striving for the same objectives.

We believe that Facebook's second concern is the potential loss of revenues when Facebook content is accessed outside of Facebook. This coming month, Power.com will be introducing a solution which will pass all Facebook advertising through with your content that is displayed outside of Facebook. We are proceeding with this without being asked in order to further demonstrate our desire to diplomatically and responsibly address the issues of distributed content inside of mashed up websites. Power.com has no interest to

interfere or to prevent Facebook from receiving revenue from all its content and will go out of its way to showcase to the industry how to responsibly solve this problem. We would welcome the opportunity to work with you to define these standards together with the leading sites on the web and introduce these standards together to the industry and inside of Facebook connect.

Finally, as a browser, most of our users experience is actually inside of Facebook and other destination sites and we do not in any way prevent users from viewing the entire Facebook experience with all ads and revenues streams intact.

While we understand your current requests to take down the current Facebook compatibility with the Power Browser today, we strongly believe that it is a mistake to disrupt the user experience of our millions of users and create attention around our private discussions.

Unlike some other sites that you are dealing with that may truly be causing harm to Facebook, Power.com's only goal is to enable new applications which enhance Facebook's users experience inside your site.

Therefore, we diplomatically request that you please grant us an extension until January 30<sup>th</sup> to work to achieve compliance with Facebook's request and to have time to diplomatically sit down with Facebook to present solutions that will assist you in dealing with these core issues not only with Power.com, but with the hundreds of other well intentioned developers who are only looking to create new innovations for Facebook, but who do not yet have the flexibility from Facebook to support their innovations. The floodgates are about to open and we would love to work proactively to solve these challenges together.

We sincerely hope you respect our decision on this and look forward to building a healthy and diplomatic dialogue with Facebook to address your true concerns of protecting your users. And we apologize for the lack of clarity on our position until today and for any confusion we may have created from this lack of clarity. Facebook's initial strong reaction did catch us off guard and after careful consideration, we have crafted this letter to make clear our position and desire and commitment to work together.

Best Regards,

Steve Vachani

CEO, Power.com

--- On Tue, 12/16/08, Cutler, Joseph P. (Perkins Coie) <[JCutler@perkinscoie.com](mailto:JCutler@perkinscoie.com)> wrote:

From: Cutler, Joseph P. (Perkins Coie) <[JCutler@perkinscoie.com](mailto:JCutler@perkinscoie.com)>

Subject: RE: Power.com

To: [steve@stevevachani.com](mailto:steve@stevevachani.com), [felipe.herrera@powerinc.net](mailto:felipe.herrera@powerinc.net)

Cc: "Demetrescu, Nicole (Perkins Coie)" <[NDemetrescu@perkinscoie.com](mailto:NDemetrescu@perkinscoie.com)>, "McCullagh, James R. (Perkins Coie)" <[JMcCullagh@perkinscoie.com](mailto:JMcCullagh@perkinscoie.com)>

Date: Tuesday, December 16, 2008, 10:41 AM

Steve,

I imagine you are in the air right now, but upon landing – could you confirm whether you are still available

at 12:00 Pacific Time? My schedule moved a bit today – and I now have either 12-12:30 or after 2:00 available. I'd like to talk at noon as you originally proposed. Will that work?

If I haven't heard from you then, I'll call you at noon.

Thanks,

Joe

---

**From:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Sent:** Monday, December 15, 2008 6:05 PM  
**To:** Cutler, Joseph P. (Perkins Coie); filipe.herrera@powerinc.net  
**Cc:** Demetrescu, Nicole (Perkins Coie); McCullagh, James R. (Perkins Coie)  
**Subject:** Re: Power.com

I will be free to go over these terms tomorrow. I am on a flight all morning, but should be free to talk around noon.

Thanks,  
Steve

Thanks,  
Steve

Sent via BlackBerry by AT&T

---

**From:** "Cutler, Joseph P. (Perkins Coie)"  
**Date:** Mon, 15 Dec 2008 17:00:53 -0800  
**To:** <steve@stevevachani.com>; <filipe.herrera@powerinc.net>  
**Subject:** RE: Power.com

Steve and Felipe,

I am sorry that we were not able to match schedules on Friday. Facebook has reviewed this letter, and is willing to accept your offer to have Facebook Connect implemented by EOD December 26 – which is two weeks from the date you sent the letter.

Meanwhile, as you may know, Facebook has taken technical measures to limit the interaction between Power.com and its network at this time. In order to fully initialize your integrated Facebook Connect status, and to lift those technical measures, Facebook requires written confirmation of the following:

1. That Power.com has purged and destroyed all data that it obtained from the Facebook network or from Facebook users prior to implementation of Facebook Connect, including all login information and/or any other data obtained or scraped from Facebook's site.
2. That Power.com has ceased displaying Facebook's trademarks on its website, except as expressly permitted by Facebook's Terms of Use, Developer Terms of Service, and/or Facebook's Connect Policies (see [http://wiki.developers.facebook.com/index.php/Facebook\\_Connect\\_Policies](http://wiki.developers.facebook.com/index.php/Facebook_Connect_Policies)).
3. That Power.com has implemented Facebook Connect in strict adherence to Facebook's Terms of Use, Developer Terms of Service, and/or Connect Policies.
4. That Power.com has removed all compatibility with Facebook's site that does not comply with Facebook's Terms of Use, Developer Terms of Service and/or Connect Policies.
5. That Power.com will in the future adhere to all of Facebook's Terms of Use, Developer Terms of Service, Connect Policies.

While Facebook does not object to Power.com's efforts to interact with Facebook's developer teams via normal channels, it will not set up any special developer meetings for Power.com.

Lastly, regarding your proposed notice to Facebook users: your Connect interaction must strictly comply with Facebook's applicable Terms and Policies. Posting a notice that casts Facebook's Connect system in a negative light will likely become counterproductive to your stated goals of working together with Facebook's developers. Facebook reserves its right to deny approval for any Facebook Connect application for any reason.

I would still like to go over these items together on the phone. Are you available for a call tomorrow (Tuesday)? If so, what time?

Please confirm that you agree with these terms, and that you will commit to integrating Facebook Connect by EOD, December 26, 2008. Please also confirm that you intend to provide the written confirmation as described above by that time.

Thanks,

Joe

---

**From:** steve@stevevachani.com [mailto:steve@stevevachani.com]  
**Sent:** Friday, December 12, 2008 1:24 PM  
**To:** Cutler, Joseph P. (Perkins Coie)  
**Cc:** felipe.herrera@corp.power.com; Eric Santos  
**Subject:** Power.com

Thank you for patience to allow us to clarify our plan of action on Power in regards to our discussion on Wednesday.

We decided to move forward with the following steps

- 1) We will implement Facebook connect on our main login page and work with the capabilities of Facebook connect for the login to our site. Instead of a login for Facebook, users will have a button which then opens the Facebook connect window and allows them to login through Facebook connect. We will say that Facebook connects current capabilities are extremely limited and we would love the opportunity to provide a Facebook connect extension to Facebook that would allow us to enrich the experience for Facebook users. We will show that to the bus dev guys when we have a chance to meet with them.
- 2) We will delete any Facebook friend information we currently have.
- 3) We will move forward and use the Facebook features to utilize Facebook's IM, updates, and some other functionality that is already available. After we finish the implementation, we would like the opportunity to get Facebook's feedback. We have some simple innovative ideas that will follow Facebook connects system, but allow for better usability and integration. As stated earlier, we do believe that the user experience of Facebook connect is extremely limited at this stage and we hope to have an open and friendly relationship with the Facebook team to share ideas and complete solutions to allowing partners to do greater integration while addressing Facebook's concerns.
- 4) We are finishing a solution that we have already been discussing with other sites that is an extension to Facebook connect that Facebook could enable that will allow us to provide more functionality to Facebook users while protecting all the concerns of Facebook.
- 5) We do understand that there is no guarantee that Facebook will accept this solution, but our only request is



that

6) We estimate that it will take us 2 weeks to completely finish this integration with Facebook connect and shift the user experience for our current users.

7) While have made the decision today to do this, we would request only one thing. We would like to meet with the business dev and guys involved on the product for thinking about solution for providing more flexibility with partners and at least present our simple code that Facebook could add that would allow us to provide a richer experience to our users and at the same time do it in a way that Facebook finds compatible with you they are envisioning their partners working with them in the future.

I believed that this email addresses everything we discussed.

The two requests we have and hope you will facilitate.

1) Can we get an email introduction to the correct people inside Facebook. We only ask for the introduction and we will follow up and see their interest to meet.

2) Provide us 2 (instead of one you offered) to implement this new solution.

We did study Digsby and others and saw the changes they made in their UI to implement Facebook connect.

Please call me now and we can discuss this further. I am heading to a flight shortly.

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.



## EXHIBIT 5

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor (*pro hac vice*)  
369 Lexington Avenue, 10<sup>th</sup> Floor  
New York, NY 10017  
Telephone: (212) 989-9113  
Facsimile: (212) 989-9163

BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP  
Alan R. Plutzik (State Bar No. 077785)  
L. Timothy Fisher (State Bar No. 191626)  
2125 Oak Grove Road, Suite 120  
Walnut Creek, CA 94598  
Telephone: (925) 945-0200  
Facsimile: (925) 945-8792

Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

Defendants.

Case No. 5:08-cv-05780 JF (RS)

**DEFENDANT POWER VENTURES,  
INC.'S RESPONSES TO  
FACEBOOK, INC.'S FIRST SET OF  
INTERROGATORIES**

Power is presently unaware of any Facebook accounts created by Power employees for purposes of their employment with Power.

**INTERROGATORY NO. 5:**

Describe in detail how AND IDENTIFY when YOU first became aware that FACEBOOK had IP blocks to keep YOU OR POWER USERS from accessing the FACEBOOK WEBSITE.

**RESPONSE TO INTERROGATORY NO. 5:**

Power objects that this interrogatory is vague and ambiguous. Subject to and without waiving those objections, Power states that on or about December 15, 2008 it received an email from Facebook's counsel, Joseph P. Cutler, stating that "Facebook has taken technical measures to limit the interaction between Power.com and its network at this time."

**INTERROGATORY NO. 6:**

Describe in detail how AND IDENTIFY when YOU first learned that YOU did not have FACEBOOK's permission to access the FACEBOOK WEBSITE.

**RESPONSE TO INTERROGATORY NO. 6:**

Power objects that this interrogatory is vague and ambiguous, overbroad, unduly burdensome, and seeks information that is not within Power's possession, custody or control. Subject to and without waiving those objections, Power states that on or about December 1, 2008 it received a letter from Facebook's counsel, Joseph P. Cutler, stating that Power's activities violated "Facebook's Terms of Use."

**INTERROGATORY NO. 7:**

Describe in detail and IDENTIFY the process by which YOU continued to access, OR provide POWER USERS' with the means to access, the FACEBOOK WEBSITE following FACEBOOK's IP blocking, including, but not limited to the POWER employee(s) OR director(s) responsible for that process OR decision.

/ / /

**RESPONSE TO INTERROGATORY NO. 7:**

Power objects that this interrogatory is vague and ambiguous, overbroad, unduly burdensome, and seeks information that is not within Power's possession, custody or control. Subject to and without waiving those objections, Power had implemented an industry standard practice to refresh, randomize, and rotate IP addresses. Power's IP addresses were regularly updated for all Power users on all social networks. These processes for updating IPs are commonplace industry standard practices which Power had implemented prior to the dispute with Facebook. Power did not change its process for providing users with access to their Facebook accounts in response to any attempted "IP blocking" by Facebook. The person responsible for Power's conduct in this regard was its CEO, Steven Vachani.

**INTERROGATORY NO. 8:**

IDENTIFY the POWER employee OR director responsible for developing the technology to allow POWER OR POWER USERS to access the FACEBOOK WEBSITE.

**RESPONSE TO INTERROGATORY NO. 8:**

Steven Vachani.

**INTERROGATORY NO. 9:**

IDENTIFY the POWER employee OR director responsible for developing the technology to allow POWER OR POWER USERS to continue to access the FACEBOOK WEBSITE following FACEBOOK's IP blocking.

**RESPONSE TO INTERROGATORY NO. 9:**

Steven Vachani.

**INTERROGATORY NO. 10:**

IDENTIFY the POWER employee OR director responsible for creating the e-mail messages sent to FACEBOOK USERS asking FACEBOOK USERS to use the POWER WEBSITE to access the FACEBOOK WEBSITE.

**RESPONSE TO INTERROGATORY NO. 10:**

Steven Vachani.

**INTERROGATORY NO. 11:**

Describe in detail the creation of POWER's internet user Bill of Rights including, but not limited to, the individual(s) responsible for drafting it, the date(s) it was drafted and the date it was posted on the POWER WEBSITE.

**RESPONSE TO INTERROGATORY NO. 11:**

Power objects that this interrogatory seeks to elicit information protected by the attorney client privilege, the attorney work product doctrine. Subject to and without waiving those objections, Power states that Power's internet user Bill of Rights was posted to Power.com on or about July 1, 2010.

**INTERROGATORY NO. 12:**

IDENTIFY the members of YOUR "product team" responsible for integrating the POWER WEBSITE with FACEBOOK Connect, as referenced in YOUR December 17, 2008 e-mail to FACEBOOK's legal counsel. Dkt. No. 56 at Ex. A.

**RESPONSE TO INTERROGATORY NO. 12:**

Eric Santos, 305 West Broadway, Suite 137, New York, NY 10013.

**INTERROGATORY NO. 13:**

Explain in detail what actions, if any, YOU took to integrate the POWER WEBSITE with FACEBOOK Connect.

**RESPONSE TO INTERROGATORY NO. 13:**

Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email correspondence concerning these issues, which will be produced upon entry of an appropriate protective order. Power's team worked relentlessly and diligently to integrate Facebook Connect

1 and explicitly communicated these efforts to Facebook. In December 2008 and January 2009, it  
2 was Power's highest priority to innovate and launch Facebook connect through Power.com.

3 **INTERROGATORY NO. 14:**

4 Describe in detail YOUR "detailed product plan" regarding the "reintegration of Facebook  
5 with Facebook connect," referenced in YOUR December 17, 2008 e-mail to FACEBOOK's legal  
6 counsel. Dkt. No. 56 at Ex. A.

7 **RESPONSE TO INTERROGATORY NO. 14:**

8 Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email  
9 correspondence concerning these issues, which will be produced upon entry of an appropriate  
10 protective order.

11 **INTERROGATORY NO. 15:**

12 IDENTIFY ALL facts in support of YOUR contention that POWER had "concerns"  
13 regarding the integration of the POWER WEBSITE with FACEBOOK Connect on the schedule  
14 requested by FACEBOOK, as asserted in POWER's Answer and Counterclaim to FACEBOOK.  
15 Dkt. No. 41 at ¶ 60.

16 **RESPONSE TO INTERROGATORY NO. 15:**

17 Pursuant to Fed. R. Civ. P. 33(d), Power refers to its business records including its email  
18 correspondence concerning these issues, which will be produced upon entry of an appropriate  
19 protective order.

20 **INTERROGATORY NO. 16:**

21 IDENTIFY the individual(s) responsible for the "business decision" not to remove existing  
22 compatibility while implementing POWER's integration with FACEBOOK Connect, as referenced  
23 in YOUR December 26, 1008 e-mail to FACEBOOK's legal counsel. Dkt. No. 56 at Ex. A.

24 **RESPONSE TO INTERROGATORY NO. 16:**

25 Steven Vachani.



1 their personal data. Power respects and honors the trust that Power users have placed in Power to  
2 securely access and store their data. Power responsibly and securely stores its users' data, and  
3 Power has never had a security breach. Unless a user requests that his or her data be deleted,  
4 Power does not delete users' data. Power has a responsibility to preserve and store this data for the  
5 user, and Power respects and honors that responsibility. Power does not delete data that users have  
6 expect us to store and to maintain for them, just as Yahoo, Gmail and Facebook, for example, do  
7 not delete data that their users expect them to store and to maintain.

8  
9 Dated: December 15, 2010

10 BRAMSON, PLUTZIK, MAHLER &  
11 BIRKHAEUSER, LLP

12 By \_\_\_\_\_/s/\_\_\_\_\_  
13 L. Timothy Fisher

14 Alan R. Plutzik (State Bar No. 77785)  
15 L. Timothy Fisher (State Bar No. 191626)  
16 2125 Oak Grove Road, Suite 120  
17 Walnut Creek, CA 94598  
18 Telephone: (925) 945-0200  
19 Facsimile: (925) 945-8792

20 LAW OFFICES OF SCOTT A. BURSOR  
21 Scott A. Bursor (*pro hac vice*)  
22 369 Lexington Avenue, 10<sup>th</sup> Floor  
23 New York, NY 10017-6531  
24 Telephone: (212) 989-9113  
25 Facsimile: (212) 989-9163

26 Attorneys for Defendants Power  
27 Ventures, Inc. and Steve Vachani  
28

**VERIFICATION**

I, Steve Vachani, declare that:

I am a defendant in the above-captioned action. I have read POWER VENTURES INC.'S RESPONSES TO FACEBOOK'S FIRST SET OF INTERROGATORIES, and know the contents thereof. The responses are true of my own knowledge except as to the matters therein stated on information and belief and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed at 5:00pm in San Francisco on December 15, 2010.

  
\_\_\_\_\_  
Steve Vachani

## PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, CA 94598. On December 15, 2010, I served the within documents:

- **DEFENDANT POWER VENTURES, INC.'S RESPONSES TO FACEBOOK, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS**
- **DEFENDANT POWER VENTURES, INC.'S RESPONSES TO FACEBOOK, INC.'S FIRST SET OF INTERROGATORIES**
- **DEFENDANT POWER VENTURES, INC.'S RESPONSES TO FACEBOOK, INC.'S FIRST SET OF REQUESTS FOR PRODUCTION**

- ☒ by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.
- ☐ by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.
- ☐ By causing a process server to personally deliver a copy of the document(s) listed above to the person(s) at the address(es) set forth below
- ☐ by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.
- ☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by pdf transmission. These documents were transmitted via e-mail to the following e-mail addresses as set forth below.

I. Neel Chatterjee  
Thomas J. Gray  
Julio C. Avalos  
Orrick, Herrington & Sutcliffe, LLP  
1000 Marsh Road  
Menlo Park, Ca 94025  
Telephone: 1-650-614-7400  
Facsimile: 1-650-614-7401  
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[tgray@orrick.com](mailto:tgray@orrick.com)  
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Jessica Susan Pers  
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Attorneys for Facebook, Inc.

Attorneys for Facebook, Inc.

1  
2 Law Offices of Scott A. Bursor  
3 Scott A. Bursor (pro hac vice)  
4 369 Lexington Avenue, 10<sup>th</sup> Floor  
5 New York, NY 10017  
6 Telephone: d 212-989-9113  
7 Facsimile: 212-989-9163  
8 Email: scott@bursor.com

9 I am readily familiar with the firm's practice of collecting and processing correspondence for  
10 mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day  
11 with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of  
12 the party served, service is presumed invalid if postal cancellation date or postage meter date is  
13 more than one day after date of deposit for mailing in affidavit.

14 I declare under penalty of perjury under the laws of the State of California that the above is true  
15 and correct, executed on December 15, 2010, at Walnut Creek, California.

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Peggy Toovey

## EXHIBIT 6

LAW OFFICES OF SCOTT A. BURSOR  
Scott A. Bursor (*pro hac vice*)  
369 Lexington Avenue, 10<sup>th</sup> Floor  
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Walnut Creek, CA 94598  
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Facsimile: (925) 945-8792

Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

Defendants.

Case No. 5:08-cv-05780 JF (RS)

**DEFENDANT POWER VENTURES,  
INC.'S RESPONSES TO  
FACEBOOK, INC.'S FIRST SET OF  
REQUESTS FOR ADMISSIONS**

**REQUESTS FOR ADMISSIONS**

**REQUEST FOR ADMISSION NO. 1:**

Admit that in a letter dated December 1, 2008, FACEBOOK requested confirmation that YOU “have ceased and desisted in...soliciting, using and/or retaining Facebook user login information”

**RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

Admitted.

**REQUEST FOR ADMISSION NO. 2:**

Admit that in a letter dated December 1, 2008, FACEBOOK requested confirmation that YOU “ceased and desisted in ...sending any manner of unsolicited commercial messages to Facebook users.”

**RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

Admitted.

**REQUEST FOR ADMISSION NO. 3:**

Admit that in a letter dated December 1, 2008, FACEBOOK requested confirmation that YOU “removed compatibility with Facebook from your website.”

**RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

Admitted.

**REQUEST FOR ADMISSION NO. 4:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that “scraping content from Facebook” violated FACEBOOK’s Terms of Use.

**RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

Admitted.

**REQUEST FOR ADMISSION NO. 5:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[s]olicitation of Facebook user login information."

**RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

Admitted.

**REQUEST FOR ADMISSION NO. 6:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[u]sing or attempting to use another person's Facebook account without authorization from the Company," i.e., FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

Admitted.

**REQUEST FOR ADMISSION NO. 7:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[u]se of automated scripts to collect information from, or otherwise interact with, the Facebook website."

**RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

Admitted.

**REQUEST FOR ADMISSION NO. 8:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[u]ploading, posting, transmitting, sharing or otherwise making available any unsolicited or unauthorized advertising, solicitations, promotional materials, 'junk mail,' 'spam,' 'chain letters,' 'pyramid schemes,' or any other form of solicitation."

**RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

Admitted.



**REQUEST FOR ADMISSION NO. 9:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[u]sing the Facebook service or site for commercial purposes, except under formal advertising programs offered by Facebook."

**RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

Admitted.

**REQUEST FOR ADMISSION NO. 10:**

Admit that in a letter dated December 1, 2008, FACEBOOK told YOU that Facebook's Terms of Use prohibited "[i]ncorporating any Facebook site content or information in any other database or compilation."

**RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

Admitted.

**REQUEST FOR ADMISSION NO. 11:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, you continued to access the FACEBOOK WEBSITE through the services available at the POWER WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 11:**

Objection vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 12:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU allowed OR provided POWER USERS with the means to access the FACEBOOK WEBSITE through the POWER WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 12:**

Admitted.

**REQUEST FOR ADMISSION NO. 13:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU provided POWER USERS with the means to access the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

Admitted.

**REQUEST FOR ADMISSION NO. 14:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU solicited FACEBOOK USER login information, including, but not limited to, user login names, e-mail addresses OR passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

Objection vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 15:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU stored FACEBOOK USER login information, including, but not limited to, user login names, e-mail addresses OR passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 15:**

Admitted.

**REQUEST FOR ADMISSION NO. 16:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used the FACEBOOK WEBSITE for commercial purposes.

**RESPONSE TO REQUEST FOR ADMISSION NO. 16:**

Denied.

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**REQUEST FOR ADMISSION NO. 17:**

Admit that YOU have never entered into a formal advertising agreement with FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

Objection vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 18:**

Admit that YOU developed OR created programming scripts OR language that would provide POWER with an automated mechanism to extract data from the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 18:**

Admitted.

**REQUEST FOR ADMISSION NO. 19:**

Admit that YOU copied OR made use of at least some part, excerpt, OR portion of FACEBOOK's source code to develop, test implement, use OR provide POWER's aggregating services.

**RESPONSE TO REQUEST FOR ADMISSION NO. 19:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 20:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU incorporated FACEBOOK WEBSITE content, DATA, or information into the POWER WEBSITE OR that services located thereon.

**RESPONSE TO REQUEST FOR ADMISSION NO. 20:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

/ / /

**REQUEST FOR ADMISSION NO. 21:**

Admit that in or about December 2008, YOU agreed to access the FACEBOOK WEBSITE OR cause others to access the FACEBOOK WEBSITE through means permitted by FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 21:**

Admitted.

**REQUEST FOR ADMISSION NO. 22:**

Admit that after receiving notice that YOUR use of or access to FACEBOOK was not permitted by FACEBOOK, YOU took, copied, OR made use of DATA from the FACEBOOK WEBSITE without FACEBOOK'S permission to do so.

**RESPONSE TO REQUEST FOR ADMISSION NO. 22:**

Admitted.

**REQUEST FOR ADMISSION NO. 23:**

Admit that FACEBOOK implemented technical measures to block YOU from accessing the FACEBOOK WEBSITE through the POWER WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 23:**

Admitted.

**REQUEST FOR ADMISSION NO. 24:**

Admit that, in or about December 2008, FACEBOOK blocked YOUR IP address(es) from accessing the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 24:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

/ / /

/ / /

**REQUEST FOR ADMISSION NO. 36:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used or attempted to another person's FACEBOOK WEBSITE account information without authorization from FACEBOOK.

**RESPONSE TO REQUEST FOR ADMISSION NO. 36:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 37:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU used automated scripts or COMPUTER CODE to collect information from, or otherwise interact with, the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 37:**

Admitted.

**REQUEST FOR ADMISSION NO. 38:**

Admit that after receiving FACEBOOK's December 1, 2008 letter, YOU uploaded, posted, OR made available promotional materials OR solicitations on the FACEBOOK WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 38:**

Objection compound, vague and ambiguous. Subject to and without waiving these objections, denied.

**REQUEST FOR ADMISSION NO. 39:**

Admit that on December 26, 2008, Steve Vachani sent an e-mail to Facebook stating YOUR "business decision" to continue accessing or using the FACEBOOK WEBSITE without implementing the Facebook Connect platform.

**RESPONSE TO REQUEST FOR ADMISSION NO. 39:**

Objection vague and ambiguous. Subject to and without waiving these objections, Power admits that Mr. Vachani sent an email to Facebook's counsel on December 26, 2008 stating:

Dear Joseph,  
I am writing to follow up to our discussions regarding Power.com's integration of Facebook connect, your requests for us to take down

**REQUEST FOR ADMISSION NO. 41:**

Admit that, between January 1, 2008 and present date, YOU displayed the FACEBOOK name OR logo on the POWER WEBSITE.

**RESPONSE TO REQUEST FOR ADMISSION NO. 41:**

Objection compound vague and ambiguous. Subject to and without waiving these objections, Power admits that it used the word Facebook on its website.

**REQUEST FOR ADMISSION NO. 42:**

Admit that on or before December 26, 2008, YOU began a “Launch Promotion” that promised POWER USERS the chance to win one hundred dollars if they successfully invited AND signed up new POWER USERS.

**RESPONSE TO REQUEST FOR ADMISSION NO. 42:**

Admitted.

**REQUEST FOR ADMISSION NO. 43:**

Admit that as part of the “Launch Promotion” described in Request for Admission No. 42, YOU provided POWER USERS with a list of their FACEBOOK friends that might be solicited to take part in the “Launch Promotion.”

**RESPONSE TO REQUEST FOR ADMISSION NO. 43:**

Admitted.

**REQUEST FOR ADMISSION NO. 44:**

Admit that as part of the “Launch Promotion” described in Request for Admission No. 42, YOU requested that POWER USERS’ select which of their FACEBOOK friends should receive an invitation to the “Launch Promotion” event.

**RESPONSE TO REQUEST FOR ADMISSION NO. 44:**

Admitted.

**REQUEST FOR ADMISSION NO. 45:**

Admit that as part of the “Launch Promotion” described in Request for Admission No. 42, YOU created a FACEBOOK event titled, “Bring 100 friends and win 100 bucks!” scheduled for March 20, 2009 at 1 a.m.

**REQUEST FOR ADMISSION NO. 50:**

Admit that the “Launch Promotion” invitation described in Paragraphs 65 through 70 of Facebook’s First Amended Complaint against YOU (Dkt. No. 9) does not contain a valid e-mail address, by which recipients of the invitation could contact YOU.

**RESPONSE TO REQUEST FOR ADMISSION NO. 50:**

Admitted.

**REQUEST FOR ADMISSION NO. 51:**

Admit that between January 1, 2008 and present date, YOU stored, saved, or otherwise retained FACEBOOK user log-in information, such as user names and/or passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 51:**

Admitted.

**REQUEST FOR ADMISSION NO. 52:**

Admit that in an e-mail dated December 12, 2008, 1:24 p.m., YOU wrote that YOU “will delete any Facebook friend information we currently have.”

**RESPONSE TO REQUEST FOR ADMISSION NO. 52:**

Admitted.

**REQUEST FOR ADMISSION NO. 53:**

Admit that in an e-mail dated December 15, 2008, 5:01 p.m., FACEBOOK, by and through its counsel, wrote to YOU: “Meanwhile as you may know, Facebook has taken technical measure to limit the interaction between Power.com and its network at this time. In order to fully initialize your integrated Facebook Connect status, and to lift those technical measures, Facebook requires written confirmation of the following: 1. That Power has purged and destroyed all data that it obtained from the Facebook network or from Facebook users prior to implementation of Facebook Connect including all login information and/or any other data obtained or scraped from Facebook’s website.”

**RESPONSE TO REQUEST FOR ADMISSION NO. 53:**

Admitted.

/ / /

**REQUEST FOR ADMISSION NO. 54:**

Admit that, between December 1, 2008 and February 1, 2008, YOU did not delete the "Facebook friend information" in YOUR possession.

**RESPONSE TO REQUEST FOR ADMISSION NO. 54:**

Admitted.

**REQUEST FOR ADMISSION NO. 55:**

Admit that, to present date, you have not deleted, purged or destroyed all data that YOU obtained from the FACEBOOK network.

**RESPONSE TO REQUEST FOR ADMISSION NO. 55:**

Admitted.

**REQUEST FOR ADMISSION NO. 56:**

Admit that, to present date, you have not deleted, purged or destroyed all FACEBOOK login information obtained from POWER users, including, but not limited to, FACEBOOK user names and/or passwords.

**RESPONSE TO REQUEST FOR ADMISSION NO. 56:**

Admitted.

Dated: December 15, 2010

BRAMSON, PLUTZIK, MAHLER &  
BIRKHAUSER, LLP

By \_\_\_\_\_/s/  
L. Timothy Fisher

Alan R. Plutzik (State Bar No. 77785)  
L. Timothy Fisher (State Bar No. 191626)  
2125 Oak Grove Road, Suite 120  
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Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

## **EXHIBIT 2**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FACEBOOK, INC. :

Plaintiff, :

v. :

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POWER VENTURES, INC. d/b/a:

POWER.COM, a California :

corporation; POWER :

Case No.

VENTURES, INC. a Cayman :

5:08-CV-05780

Island Corporation, STEVE :

JW (HRL)

VACHANI, an individual; :

DOE 1, d/b/a POWER.COM, an:

individual and/or business:

entity of unknown nature; :

DOES 2 through 25, :

inclusive, individuals :

and/or business entities :

of unknown nature, :

Defendants. :

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HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

09:57 1 having worked as a product manager, but I could not  
09:57 2 code in any of this.

09:57 3 Q. And how about Perl?

09:57 4 A. I'm familiar -- familiar with it  
09:57 5 again, but no -- no programming experience.

09:57 6 Q. Are you familiar with the term  
09:57 7 "script" as it's used in computer programming?

09:57 8 A. Yes.

09:57 9 Q. All right. What would your  
09:57 10 understanding of a script be?

09:57 11 A. A script is a -- an auto -- it's  
09:58 12 something that you instruct a -- a computer to do  
09:58 13 something.

09:58 14 Q. Have you ever been involved in the  
09:58 15 development of any types of scripts?

09:58 16 A. Personally?

09:58 17 Q. Yes.

09:58 18 A. I mean, I've been involved as a  
09:58 19 product manager. Not as a programmer or coder.

09:58 20 Q. Okay. In the level --

09:58 21 A. Project manager -- as a CEO  
09:58 22 leading products.

09:58 23 Q. As a CEO or as a project manager --

09:58 24 A. Yes. That's correct.

09:58 25 Q. -- working with scripts, what

10:04 1 A. Legally, no. As I mentioned at  
10:04 2 the moment, any new activities that I'm pursuing,  
10:04 3 I'm pursuing under this entity, so I'm currently  
10:04 4 engaged in conversations with -- with people.

10:04 5 Q. And when did you join Power?

10:04 6 A. Power was founded in -- It was  
10:04 7 2006 is when our -- our primary activities started.  
10:04 8 We incorporated Power, I believe it was, if I'm not  
10:04 9 mistaken, late 2006 and -- but the activities  
10:05 10 started previously as a start-up, we started  
10:05 11 working on it.

10:05 12 Q. Were you one of the creators of  
10:05 13 Power?

10:05 14 A. I was the founder of the company.

10:05 15 Q. Now, when you say it was  
10:05 16 incorporated in 2006 but started before then, was  
10:05 17 it started under the Web site title www.power.com?

10:05 18 A. No. It was originally -- When we  
10:05 19 originally started it, there was no Web site. It  
10:05 20 was a -- Like many startups we were -- we were  
10:05 21 working on a core, you know, product idea, and  
10:05 22 later the name power.com came about in 2007. I  
10:05 23 believe we acquired the domain in 2007.

10:05 24 Q. Who helped -- Besides yourself,  
10:05 25 who helped create Power.com. You used the --

02:33 1 Q. Do you know if there were  
02:33 2 documents reflecting Power's ideas being bantered  
02:33 3 about describing how they could get new members?

02:33 4 A. Yes. I believe we provided those  
02:33 5 to you.

02:33 6 Q. Do you know -- How many documents  
02:33 7 do you believe you provided to Facebook  
02:34 8 approximately?

02:34 9 A. I think it was -- not -- less -- I  
02:34 10 don't know. It was less than ten, I believe.

02:34 11 Q. The -- And how often were  
02:34 12 marketing schemes discussed internally at Power, if  
02:34 13 you know?

02:34 14 A. How often? They would be in  
02:34 15 conversations, like, we'd have -- we -- meetings.  
02:34 16 There would be conversations if anything became  
02:34 17 relevant or useful. There would be -- Most of them  
02:34 18 were e-mail discussions, so e-mail discussions  
02:34 19 would be where most of conversations took place,  
02:34 20 but obviously they were also verbal conversations.

02:34 21 Q. Do you know if any particular  
02:34 22 discussions ever occurred relating to soliciting  
02:34 23 members from Facebook?

02:34 24 A. Soliciting members from Facebook?  
02:34 25 What do you mean?

02:34 1 Q. To join -- To join Power.

02:34 2 A. We didn't have access to -- The  
02:35 3 users could invite their friends. So that was a  
02:35 4 feature that -- One of our promotions in our  
02:35 5 features was that you could invite your friends to  
02:35 6 join, invite your friends on Facebook to join, and  
02:35 7 so people could -- they could make promotions so  
02:35 8 they could create events around -- around a power  
02:35 9 creativity around Power. So we gave our user -- We  
02:35 10 encourage our users, in fact, to bring their  
02:35 11 friends in the same way that Facebook encourages  
02:35 12 its users to bring their friends from other sites.  
02:35 13 But we employed same tactics that are used by --  
02:35 14 similar tactics where you invite your friends, so  
02:35 15 we did use invite friends features and promotions.

02:35 16 Q. If you go back to Exhibit 103, you  
02:35 17 see various -- "Displayed a Launch Promotion" in  
02:35 18 the upper left-hand corner?

02:35 19 A. Yup.

02:35 20 Q. It says, "First 100 people who  
02:35 21 bring 100 new friends to power.com earn \$100?"

02:36 22 A. Yes.

02:36 23 Q. Is that an example of a pop-up  
02:36 24 that was made available on the site that was  
02:36 25 designed to encourage new users to the site?

02:36 1 A. I don't know if this was a pop-up.  
02:36 2 You can see it was prominently displayed on the  
02:36 3 front page. That's not more than that, it's not a  
02:36 4 pop-up. I think the terminology is not pop-up it's  
02:36 5 an ad -- In fact, it's a prime-placed ad on the  
02:36 6 home page.

02:36 7 Q. Do you know whose idea it was for  
02:36 8 this particular promotion?

02:36 9 A. That was mine.

02:36 10 Q. Do you know when you came up with  
02:36 11 it?

02:36 12 A. While I was sleeping. I just  
02:36 13 thought a hundred, hundred, hundred was a good  
02:36 14 idea.

02:36 15 Q. All right. And when you clicked  
02:36 16 on the Number 100, what would happen?

02:36 17 A. It gave you a chance to -- to  
02:36 18 select which friends you wanted to -- to, I guess,  
02:36 19 invite to -- to join -- to join Power.

02:36 20 Q. All right. And was that -- Would  
02:36 21 you agree that, as reflected on Exhibit 103, that  
02:37 22 particular promotion was made available at the time  
02:37 23 that you were connected to Facebook?

02:37 24 A. Yes. It was.

02:37 25 Q. And if you clicked on 100 people,



02:37 1 you would be invited to ask your friends to join  
02:37 2 power.com?

02:37 3 A. No. You would have the option to  
02:37 4 invite your friends to join just like you have the  
02:37 5 option on Facebook to invite your friends to join  
02:37 6 Facebook and every other site on the Internet, and  
02:37 7 if they did, if they reach a hundred friends that  
02:37 8 joined, they would earn \$100.

02:37 9 Q. And if you accepted the feature  
02:37 10 that came up saying would you -- it said something  
02:37 11 like, "Would you like to invite your friends to  
02:37 12 Power"?

02:37 13 A. Yes.

02:37 14 Q. If you hit "yes" or "I agree" --

02:37 15 A. Yes.

02:37 16 Q. -- how -- what -- what  
02:37 17 automation would occur at that point?

02:37 18 A. So first of all, you have to  
02:38 19 remember that 99 percent of our users were not --  
02:38 20 were not using -- were not using Facebook. They  
02:38 21 were users on other sites, so we actually -- I  
02:38 22 guess you could say we were actually a big source  
02:38 23 of providing users to Facebook in Brazil. In fact,  
02:38 24 as -- I guess you could say it was a gift, but we  
02:38 25 -- we brought a large amount of Orkut users to

02:38 1 Facebook, so that's where a lot of our promotions  
02:38 2 were -- Because our users already, as you know,  
02:38 3 have -- Prior to having Facebook, we had millions  
02:38 4 of users who have hundreds of friends already in  
02:38 5 the system, and that represented 99 percent of our  
02:38 6 contacts in our system. Facebook was a very small  
02:38 7 part of this world. At that time, obviously it's a  
02:38 8 much larger site today but in our world, in our  
02:38 9 growth it was -- it was introduced later. So we  
02:38 10 were encouraging our friends -- our users to go and  
02:38 11 register at Facebook and become Facebook users.  
02:38 12 Because in our -- in our view, the more social  
02:39 13 networks that users were using, the more value it  
02:39 14 would be to, you know, to aggregate different  
02:39 15 sites. So we encouraged users to sign up for  
02:39 16 Facebook. In fact, we're giving free marketing to  
02:39 17 Facebook. So to answer your question, a lot of  
02:39 18 these users -- You could see all your friends from  
02:39 19 all your sites and say, "Hey. Join Facebook when  
02:39 20 you're at Facebook." That was a big part of our  
02:39 21 promotions. That was the largest part of our  
02:39 22 promotions. And then, of course, if they have  
02:39 23 friends that are already using Facebook -- Facebook  
02:39 24 and they wanted to invite their friends to come use  
02:39 25 Power, that's the smaller part. But the biggest

02:39 1 one were obviously the friends that the user had  
02:39 2 already put in the system.

02:39 3 Q. The promotion itself had to have  
02:39 4 an attribute created for it in the MSQl database.  
02:39 5 Correct?

02:39 6 A. Yes. That's correct.

02:39 7 Q. And that attribute would then be  
02:40 8 assigned to anybody who clicked on the promotion.  
02:40 9 Correct?

02:40 10 A. What do you mean "the attribute"?

02:40 11 Q. Well, if someone clicked on the  
02:40 12 promotion, their user name would then be assigned  
02:40 13 to the attribute associated with the promotion.  
02:40 14 Correct?

02:40 15 A. If they selected to invite a  
02:40 16 friend, they could send an invitation to that  
02:40 17 friend.

02:40 18 Q. That's not what I'm talking about.  
02:40 19 The minute that -- Let's say I'm Ms. Almeirda who's  
02:40 20 being shown on the screen shot.

21 A. Okay.

02:40 22 Q. If Ms. Almeirda clicks on the  
02:40 23 launch promotion --

02:40 24 A. Yes.

02:40 25 Q. -- she would have received a --

02:42 1 technically it was -- it was much easier just to  
02:42 2 manually look and I believe -- We can see how many  
02:42 3 friends people invited so -- and then we just  
02:42 4 manually took those people out. I think they were  
02:42 5 -- When we provided it, I think there might have  
02:42 6 been 30 or 40 people that achieved it, so it was  
02:42 7 literally just looked on the list of people who  
02:42 8 invited friends to Power who had more than a  
02:43 9 hundred.

02:43 10 Q. All right. But when say, "looked  
02:43 11 on the list" you were looking in a database table.  
02:43 12 Correct?

02:43 13 A. Yeah. We went to our database.  
02:43 14 Importing friends is a -- is a feature. It's a --  
02:43 15 It's a -- As I mentioned many times, it's one of  
02:43 16 our features on our site.

02:43 17 Q. And in order to see how the  
02:43 18 promotion was set up in terms of identification of  
02:43 19 those who were participating in it, I'd need to see  
02:43 20 the database. Correct?

02:43 21 A. To see the -- Every single user on  
02:43 22 our site has the option to invite friends. Who  
02:43 23 achieved a hundred, I can tell you. I don't know  
02:43 24 the number but it was 30 something people that  
02:43 25 received -- that reached a hundred friends, so I

02:44 1 looked in the database. Correct?

02:44 2 A. We looked in our database,  
02:44 3 correct. And we provided the numbers, I believe,  
02:44 4 on that promotion to you guys.

02:45 5 Q. When somebody clicked on the  
02:45 6 launch promotion and they were given, like you to  
02:45 7 invite your friend" --

02:45 8 A. That's correct.

02:45 9 Q. -- and they hit yes, at that  
02:45 10 point the importer, as we've been calling it, would  
02:45 11 automatically contact all friends on Facebook to  
02:45 12 invite them to --

02:45 13 A. Let's be clear. We don't have  
02:45 14 access to any friends' e-mail addresses, so there  
02:45 15 was not a single E mail sent by Face -- by Power  
02:45 16 for -- We have e-mail addresses for friends on  
02:45 17 other sites, but on -- so we -- If they wanted to  
02:45 18 invite, as I said 99 -- well over 90 percent of our  
02:45 19 users were Orkut users and Orkut friends and had  
02:45 20 friends from other sites where they -- on sites  
02:45 21 that allowed their E mails, but Facebook didn't --  
02:45 22 didn't allow E mails, otherwise, we would have been  
02:45 23 happy to send an invitation to those friends to  
02:45 24 invite them; so that was not available for us for  
02:46 25 Facebook.

02:46 1 Q. At this point, I haven't even  
02:46 2 talked about E mail. All I meant is at the point  
02:46 3 at which someone said yes they'd like to invite  
02:46 4 their friends, the database would then recognize,  
02:46 5 using its importer function and the idea of the  
02:46 6 registered user Power, who the friends were.  
02:46 7 Correct?

02:46 8 A. It would show you a list of all  
02:46 9 your friends, yes, from your friends list.

02:46 10 Q. And the invitation to join was  
02:46 11 then automatically forwarded to those friends  
02:46 12 whether through E mail if you're on Orkut or some  
02:46 13 other way on Facebook. Correct?

02:46 14 A. A user had to say, "I want to  
02:46 15 invite this friend," so it's -- An authorized user  
02:46 16 said, "Yes, these are my friends, and these are the  
02:46 17 friends I want to invite to this site." That is  
02:46 18 correct.

02:46 19 Q. All right. And at that point, an  
02:46 20 automated script would contact whatever friends  
02:46 21 were identified. Correct?

02:46 22 A. Depends on -- So if the friend was  
02:46 23 a non-- Facebook did not provide E mails. If the  
02:47 24 friend was, like, on another site and they had the  
02:47 25 E mail, they could -- they could send on E mail

02:51 1 copy their friends and say, "Sign up with this  
02:51 2 link." They were unlimited ways that people can  
02:51 3 communicate with their friends.

02:51 4 Q. All right. But the link was  
02:51 5 provided in the communication by Power. Correct?

02:51 6 A. The link was given -- Power  
02:51 7 provided a link to our users to encourage them to  
02:51 8 invite their friends.

02:51 9 Q. And did Power also prepare the  
02:51 10 script that was included with that invitation?

02:51 11 A. I think, yeah, we provided them --  
02:51 12 we provided them a script, yeah. As every single  
02:51 13 -- As Facebook does and everybody else does.

02:51 14 Q. Now, in the case of Facebook, you  
02:51 15 say that Facebook didn't permit you to contact  
02:51 16 through E mails?

02:51 17 A. What do you mean "Facebook doesn't  
02:51 18 permit"? Facebook did -- It has nothing to do with  
02:51 19 permitting it. We wanted -- If we wanted to -- We  
02:51 20 just didn't have access to the E mails because  
02:52 21 Facebook -- If we wanted to, we could have -- We  
02:52 22 didn't get to that, but we would be happy to build  
02:52 23 a feature that imported your E mail contacts, but  
02:52 24 we didn't -- we didn't do that. We never got to  
02:52 25 that point.

02:53 1 that you could determine how many Facebook  
02:53 2 registered users were contacted as part of this  
02:53 3 promotion?

02:53 4 A. Facebook registered users?  
02:53 5 Meaning if they were contacted -- In what manner?  
02:53 6 If they happened -- If they were contacted at Orkut  
02:53 7 and they happened to have an account on Facebook  
02:53 8 but were not contacted through -- through the help  
02:53 9 of Facebook?

02:53 10 Q. No. I'm talking about were there  
02:53 11 individuals at Facebook contacted on the Facebook  
02:53 12 -- through the Facebook system --

02:53 13 A. Yes.

02:53 14 Q. -- as a result of this promotion?

02:53 15 A. Yes. Of course.

02:53 16 Q. Is there a way to determine how  
02:53 17 many were contacted?

02:54 18 A. Well, we could do -- If you take a  
02:54 19 few minutes, we can probably figure out -- It's  
02:54 20 obviously very small, but -- Because the Facebook  
02:54 21 users were so small, but let's think about -- So  
02:54 22 people created events on Facebook, so promoting it,  
02:54 23 because our users were -- You know, some of them  
02:54 24 created events saying, "Come on Facebook," about  
02:54 25 come and joining, they created messages. They



02:57 1 at that time, but I know it's usually standard, you  
02:58 2 know, more common to have a default to invite all  
02:58 3 your friends. I think Facebook does that, in fact.

02:58 4 Q. Setting aside what the default  
02:58 5 was, as part of the invitation, would list the  
02:58 6 friends that could be contacted?

02:58 7 A. That's correct.

02:58 8 Q. And that would list the friends  
02:58 9 who were available as friends on Facebook.  
02:58 10 Correct?

02:58 11 A. I believe so, yes.

02:58 12 Q. And for the friends who were  
02:58 13 contacted on Facebook, an invitation to join Power  
02:58 14 would then be set if the person had that person  
02:58 15 selected as, "Yes. I would like them to be  
02:58 16 invited"?

02:58 17 A. Yeah. If they could communicate  
02:58 18 to invite them, they would be invited.

02:58 19 Q. And earlier you said that however  
02:58 20 the mechanism was, whether it was events or E mails  
02:58 21 for other Web sites or whatever -- setting aside  
02:58 22 the telephone call, if it was in a text-based  
02:58 23 communication --

02:58 24 A. Yes.

02:58 25 Q. -- Power would provide the text

02:58 1 and the URL link to Power as part of that  
02:58 2 communication so --

02:58 3 A. Yes.

02:59 4 Q. -- so the friends would know  
02:59 5 where to go to be invited. Correct?

02:59 6 A. We would provide them text that  
02:59 7 they could use. Correct. Of course.

02:59 8 Q. And the list of friends was  
02:59 9 recovered from the database and the variables that  
02:59 10 were associated with friends with that user ID?

02:59 11 A. Every -- I think -- Every user --  
02:59 12 One of our core features is you can access all your  
02:59 13 friends and create a friends list. So, yes, I  
02:59 14 mean, you have a friends list and you can select  
02:59 15 from your aggregated friends list who you want to  
02:59 16 invite.

02:59 17 Q. Now, earlier you said while most  
02:59 18 people contacted their Web site dynamically inside  
02:59 19 the browser, the functionality existed to have the  
02:59 20 automation available on through the PowerScript  
02:59 21 also contact the Web sites. Correct?

02:59 22 A. What do you mean?

02:59 23 Q. In other words, you -- In order to  
02:59 24 obtain -- user content, for instance, from Web  
02:59 25 sites, you could use the automated script available

02:59 1 through PowerScript to download --

02:59 2 A. That's what any importer does.

03:00 3 When you use an importer, you're -- you're

03:00 4 basically authorizing a script to go to another

03:00 5 site and access certain data. So, like, when

03:00 6 Facebook -- as your Facebook import you authorize a

03:00 7 script written by Facebook to go to another site,

03:00 8 take that data, bring it back, and then Facebook

03:00 9 sends an invitation on behalf of the user. That's

03:00 10 the same process that we go through. That is

03:00 11 correct.

03:00 12 Q. And in the invitation that was

03:00 13 then sent as part of the launch promotion to a

03:00 14 Facebook user, how would the Power site know what

03:00 15 function or what feature on Facebook to populate

03:00 16 the invitation to? In other words, how would it

03:00 17 know to send it to an event or say an instant

03:00 18 message or whatever medium of communication?

03:00 19 A. Well, Facebook doesn't have

03:00 20 instant message. You know, a user can go and -- If

03:00 21 a user wanted to manually click on a friend and

03:01 22 say, "Hey," I don't believe even they had Facebook

03:01 23 chat at that time, so there wasn't even -- I don't

03:01 24 think it was a feature, so we didn't even interact

03:01 25 with that. They could write a message to their

03:01 1 friend. They could create an event or they could  
03:01 2 go and, I guess, take that link up and paste it and  
03:01 3 write an E mail to their friend.

03:01 4 Q. Was one of the ways that Power was  
03:01 5 able to make the invitation available to Facebook  
03:01 6 users is that the PowerScript would set up an event  
03:01 7 on Facebook on behalf of the user who had clicked  
03:01 8 on --

03:01 9 A. If the user authorized for the  
03:01 10 creation of the event, yes.

03:01 11 Q. And if the -- How did the -- How  
03:01 12 did Power know it was to set up an event as opposed  
03:01 13 to any other way of communicating --

03:01 14 A. Because the user said, "Create an  
03:01 15 event for me," so user authorized the creation of  
03:01 16 an event.

03:01 17 Q. Was that made available on the  
03:01 18 promotion -- on the pop-up that made -- would come  
03:02 19 up --

03:02 20 A. That was -- As I said, if you  
03:02 21 clicked that, that was one of the options that the  
03:02 22 user had an option to create an event.

03:02 23 Q. What other options did the user  
03:02 24 have? We can take a break here.

03:02 25 THE VIDEOGRAPHER: It's 3:01. Off

03:02 1 the record, Tape 4.

03:02 2 (Whereupon, a recess is taken.)

03:14 3 THE VIDEOGRAPHER: 3:13, on the  
03:14 4 record. Beginning of Tape 5.

03:14 5 Q. Mr. Vachani, just before the break  
03:14 6 you indicated that in the instance of Facebook  
03:14 7 being contacted by Power --

03:14 8 MR. COOPER: Strike that.

03:14 9 Q. That in the instance in which a  
03:14 10 friend of somebody who had indicated their interest  
03:14 11 in participating in the launch promotion, the  
03:14 12 friend was on Facebook, that one option that was  
03:14 13 available to contact that friend was events. Do  
03:14 14 you recall that before the break saying?

03:15 15 A. I believe creating a event.

03:15 16 Q. Do you recall what the other  
03:15 17 options were?

03:15 18 A. I don't offhand, but I think they  
03:15 19 provided a link where they could -- So everyone was  
03:15 20 given a unique link so they could go do whatever  
03:15 21 they want with that link, write E mails to friends,  
03:15 22 call on the phone, whatever so that was -- When  
03:15 23 they clicked, they were made available a link, and  
03:15 24 I think that maybe send in a message so Facebook --  
03:15 25 While they can't send an E mail, they can send a

03:15 1 message to friends on Facebook, so they could  
03:15 2 message their friend. So if the user said, "I want  
03:15 3 to send a message, private message," they could  
03:15 4 send a private message to their friend, if I'm not  
03:15 5 mistaken.

03:15 6 Q. Let me -- Any other options?

03:15 7 A. I don't remember offhand, but  
03:15 8 those are the -- I think the primary ones, but  
03:15 9 obviously they had -- they had a link that they  
03:15 10 could use whatever way they wanted to. They could  
03:15 11 create an event -- create an event, send a message.  
03:16 12 Those are the ones I could think of off hand, but I  
03:16 13 believe whatever details on this were also provided  
03:16 14 in the past in the previous declarations.

03:16 15 Q. In the case of providing a link,  
03:16 16 in what way was the link displayed on Facebook?

03:16 17 A. When the user is provided a link  
03:16 18 on Power, and they can copy and paste and do  
03:16 19 whatever they want to -- to go promote that link.

03:16 20 Q. I see.

03:16 21 A. So just as any invitation process  
03:16 22 on sites. You give a unique link which has your  
03:17 23 unique identifier in it, so if someone signs up  
03:17 24 from that link you -- you get credit for it.

03:17 25 Q. And that link would be the URL to

03:20 1 that was sent to Facebook --

03:20 2 A. Usually --

03:20 3 MR. BURSOR: Objection. Vague and  
03:20 4 ambiguous.

03:20 5 Q. Do you know who created the text  
03:20 6 that was prepared through the automated script that  
03:20 7 was sent by Power to Facebook users?

03:20 8 MR. BURSOR: Objection. Vague and  
03:20 9 ambiguous. Assumes facts not in evidence. Lacks  
03:20 10 foundation. You can answer.

03:20 11 A. I'm repeating what he said.  
03:20 12 Objecting. It's vague and ambiguous.

03:21 13 MR. BURSOR: I objected. If you  
03:21 14 can understand it, you can answer it.

03:21 15 Q. Mr. Vachani, as I said at the  
03:21 16 beginning, your attorney has the right to interject  
03:21 17 actions unless he instructs you not to answer --

03:21 18 A. Okay.

03:21 19 Q. Let me -- One of the ways that you  
03:21 20 said that Facebook users would be contacted for  
03:21 21 this promotion was the Power user could say they  
03:21 22 wanted to participate and contact friends to create  
03:21 23 an event?

03:21 24 A. Correct.

03:21 25 Q. And you said the automatic script

03:21 1 -- the automated script created by Power would, in  
03:21 2 fact, create an event on Facebook?

03:21 3 A. If the user authorized it and  
03:21 4 indicated they wanted to do that. That's correct.

03:21 5 Q. As part of the creation of that  
03:21 6 event, was text included as part of event set up --

03:21 7 A. They were shown texts just like  
03:21 8 standard practice. They were shown it and  
03:21 9 authorized it.

03:21 10 Q. And that text included the same  
03:22 11 link to the URL to Power?

03:22 12 A. I would assume it has the link in  
03:22 13 it, yes.

03:22 14 Q. The E mails that you said were  
03:22 15 sent to users of, like, Orkut that had e-mail  
03:22 16 addresses available on your site --

03:22 17 A. Correct.

03:22 18 Q. To the best of your knowledge --  
03:22 19 And you said the link itself was one way that you  
03:22 20 would be allowed to contact users. Correct?

03:22 21 A. Well, you could take the link and  
03:22 22 pass the link. It's -- You provide them a unique  
03:22 23 link and they can go to messenger and copy that  
03:22 24 link and say, "Hey, go sign up for -- for Power."

03:22 25 Q. Do you know if that URL had an ID



04:14 1 create an event as part of \$100 promotion use the  
04:14 2 language, "Bring 100 friends and 100 bucks"?

04:14 3 MR. BURSOR: Hold on a second.  
04:14 4 Objection. Vague, ambiguous. Assumes facts not in  
04:14 5 evidence. Lacks foundation. If you could clarify  
04:14 6 whether you're referring to PowerScript or Facebook  
04:14 7 script, that might help clear up some of the --

04:14 8 MR. COOPER: I asked specific -- I  
04:14 9 will say it again. Was the language, "Bring 100  
04:14 10 friends and win 100 bucks," language that was used  
04:14 11 in the Power automated script when it set up the  
04:14 12 event on Facebook?

04:14 13 MR. BURSOR: Objection. Vague,  
04:14 14 ambiguous. Assumes facts not in evidence. Lacks  
04:15 15 foundation. Listen to the question carefully, and  
04:15 16 if you can understand it, you can answer it.

04:15 17 A. Bring 100 friends and 100 bucks  
04:15 18 was our -- our tag line, so -- but I don't --  
04:15 19 whether the user entered that in on their own or  
04:15 20 whether they -- they put this. I cannot say from  
04:15 21 this -- from looking at this, but that was the  
04:15 22 language that we suggested to users to use. But  
04:15 23 many users changed the language, too, and put other  
04:15 24 language in those events, so I can't -- This is one  
04:15 25 example of a user creating an event. I cannot say

04:15 1 what -- you know, how this was specifically created  
04:15 2 because they -- they had -- they could have created  
04:15 3 this event and the language was -- That was the tag  
04:15 4 line we were promoting, but I do not know if this  
04:15 5 was specifically -- this specific E mail or if they  
04:16 6 copied and pasted it if they did whatever. But  
04:16 7 what I do know is, this was an event where the user  
04:16 8 specifically authorized us and said -- either  
04:16 9 created this event manual or specifically  
04:16 10 authorized us to create this event.

04:16 11 MR. COOPER: We've got to go off  
04:16 12 the record.

04:16 13 THE VIDEOGRAPHER: It's 4:15. Off  
04:16 14 the record. End of Tape 5.

04:16 15 (Whereupon, a recess is taken.)

04:23 16 THE VIDEOGRAPHER: 4:22, on the  
04:23 17 record. Beginning of Tape 6.

04:23 18 Q. Before the break you indicated  
04:23 19 that, "Bring 100 friends and win 100 bucks" was the  
04:23 20 tag line but you couldn't say for sure how the --

04:23 21 MR. COOPER: Strike that.

04:23 22 Q. Before the break, you indicated  
04:23 23 that "Bring 100 friends and win 100 bucks" was the  
04:23 24 tag line employed by Power. Correct?

04:23 25 A. That was the tag line of the

04:23 1 campaign and the suggested text and promotion that  
04:23 2 we encourage our users to promote in any kind of  
04:23 3 promotion they made in the acquisition of and  
04:23 4 invitation of friends.

04:23 5 Q. Where would I find documentation  
04:23 6 reflecting precisely what language was suggested  
04:23 7 that users use with Facebook events?

04:23 8 A. That would have been on the -- the  
04:23 9 power -- on this page. On the page after they  
04:24 10 clicked on this promotion, so it came up with a  
04:24 11 page --

04:24 12 Q. Talking about Exhibit 103?

04:24 13 A. I don't know if that page -- Does  
14 it exist?

04:24 15 Q. I'm asking if you're talking about  
16 Exhibit 103.

04:24 17 A. I'm talking about this page. I  
04:24 18 don't know if there's an exhibit.

04:24 19 Q. You're pointing to Exhibit 103?

04:24 20 A. Exhibit 103, I'm sorry. So if  
04:24 21 they clicked on that, there was a page that they  
04:24 22 went to.

04:24 23 Q. And --

04:24 24 A. Gave them those options.

04:24 25 Q. Where, if at all, does that

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

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[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[illegible]

[illegible]

04:28 1 application PowerScript application?

04:28 2 A. The actual language?

04:28 3 Q. Yes.

04:28 4 A. Was -- That was -- That phrase  
04:28 5 "Bring 100 friends, 100 bucks" was created by me.

04:28 6 Q. Do you know if the remainder of  
04:28 7 any text that was employed in suggested text in  
04:28 8 private messages that were used on Facebook as a  
04:29 9 result of automated script were prepared by you?

04:29 10 MR. BURSOR: Could you read that  
04:29 11 back, please?

04:29 12 (Whereupon, the last question is  
04:29 13 read back by the reporter.)

04:29 14 MR. BURSOR: Objection. Vague,  
04:29 15 ambiguous. Assumes facts not in evidence. Lacks  
04:29 16 foundation. You can answer.

04:29 17 A. Repeat the question one more time.

04:29 18 Q. You earlier indicated private  
04:29 19 messages were one of the ways that the automated  
04:29 20 script would permit somebody using this campaign to  
04:29 21 contact friends on Facebook.

04:29 22 A. Okay. So to be clear --

04:29 23 Q. Yes or no.

04:29 24 A. I want to clarify. Earlier I said  
04:29 25 that could be one of the ways that someone could

04:29 1 send it. I honestly don't know if we actually ever  
04:29 2 used private messages. It was a long time ago. To  
04:29 3 my recollection, I don't -- I don't remember us  
04:29 4 sending private messages, but it was definitely  
04:30 5 something we -- we discussed, but I don't know if  
04:30 6 we actually ever got to employing that method.  
04:30 7 It's been a long time since that happened. It's  
04:30 8 possible that users took suggested text and wrote  
04:30 9 messages to friends and if -- I don't remember if  
04:30 10 we actually employed that technique, but it's  
04:30 11 something we obviously would have been happy to do  
04:30 12 because if the user authorized us to do it, I just  
04:30 13 don't remember if we actually did it.

04:30 14 Q. Looking at Exhibit 103, the launch  
04:30 15 promotion --

04:30 16 A. Yup.

04:30 17 Q. -- who prepared the PowerScript  
04:30 18 that is reflected in that launch promotion?

04:30 19 A. It could have been Carlos or  
04:30 20 Danilo.

04:30 21 Q. What documentation shows how that  
04:30 22 launch promotion was implemented on power.com?

04:30 23 A. It was either -- It was either a  
04:30 24 verbal, "Hey, use this text," in a meeting, said,  
04:31 25 "Hey, this is the text you should use," and they



04:31 1 took it or there was an E mail. I don't know.

04:31 2 Q. But you see the box, "Launch  
04:31 3 Promotion." Correct?

04:31 4 A. Yes.

04:31 5 Q. That is a feature that is made  
04:31 6 available to the power.com user through the  
04:31 7 power.com Web site. Right?

04:31 8 A. Yes.

04:31 9 Q. None of the aggregated social  
04:31 10 networks prepared the contents shown in that  
04:31 11 promotional box. Correct?

04:31 12 A. Right.

04:31 13 Q. Where would I find documentation  
04:31 14 showing me how that launch promotion was  
04:31 15 implemented on power.com?

04:31 16 A. So it either was in a meeting that  
04:31 17 we had where I said, "Hey, this is the text you  
04:31 18 want to use for this promotion," and they would  
04:31 19 have noted it down, or it would have been an E mail  
04:31 20 that was sent saying, "Use this text." One of  
04:31 21 those two. I don't know which one it was because  
04:31 22 we had weekly meetings where we discussed ideas and  
04:31 23 this was -- this was an idea that I had come up  
04:32 24 with. So many times I would share my idea. I  
04:32 25 would say, "Eric, use this text. This is a



04:41 1 Q. And it was sued, in part, because  
04:41 2 of Facebook's allegations relating to how this  
04:41 3 launch promotion was employed. Correct?

04:41 4 A. I don't know what Facebook made  
04:41 5 allegations to is right there.

04:41 6 Q. Earlier you said that Facebook is  
04:41 7 responsible for sending the E mail notification  
04:41 8 about the invite.

04:41 9 A. Yeah. That was sent by Facebook  
04:42 10 servers.

04:42 11 Q. But Facebook's E mail servers  
04:42 12 would not send the invite, but for the initiation  
04:42 13 of the event. Correct?

04:42 14 A. A user has to authorize -- A user  
04:42 15 has to create an event for Facebook to do that and  
04:42 16 a user has to log in with their user name and  
04:42 17 password and do this, so Facebook authorizes its  
04:42 18 users to create events as part of their -- That's  
04:42 19 the relationship Facebook has with its users.

04:42 20 Q. You indicated some of the events  
04:42 21 are set up through the automated scripted?

04:42 22 A. No. What I indicated is that  
04:42 23 users -- users created these events. Whether the  
04:42 24 user authorized -- whether they authorized an agent  
04:42 25 to go do it for them or they did it, it's the same

04:42 1 thing. It's initiated by the user, that's what we  
04:42 2 know.

04:42 3 Q. The automated script, though, is  
04:42 4 operated by power.com?

04:42 5 A. It's a -- An automated script for  
04:42 6 PowerScript, are initiated by users and executed by  
04:42 7 power.com in the same way that an exporter is  
04:43 8 initiated by user and managed by the site that's  
04:43 9 doing it on behalf of the user. Did you get that?  
04:43 10 Yes.

04:43 11 (Whereupon, Exhibit 107 is marked  
04:43 12 for identification by the reporter.)

04:43 13 Q. Mr. Vachani, Exhibit 107 is  
04:43 14 Exhibit A to the first amended complaint that was  
04:43 15 106. Have you seen this document before today?

04:43 16 A. What is this document I'm looking  
04:43 17 at?

04:43 18 Q. Exhibit A to the first amended  
04:43 19 complaint.

04:43 20 A. Is this the Facebook Terms and  
04:43 21 Conditions?

04:43 22 Q. Yes.

04:44 23 A. I have -- Vaguely -- I've seen  
04:44 24 this before, yes. I don't know if I've seen this  
04:44 25 specific version. I've read the Facebook Terms and

04:45 1 says Page 415?

04:45 2 A. Yes.

04:45 3 Q. Can you read the first bullet  
04:45 4 point to yourself and tell me when you've finished?

04:45 5 A. The first bullet point? Yes.

04:45 6 Okay.

04:45 7 Q. As of December 1st, 2008, do you  
04:45 8 know one way or another whether anybody at Power  
04:45 9 had read that particular provision in the Facebook  
04:45 10 Terms of Service?

04:45 11 A. Yes.

04:45 12 Q. Had you read it?

04:45 13 A. Yes.

04:45 14 Q. All right. Did you have an  
04:46 15 understanding whether power.com enabled users to  
04:46 16 registered users to violate the Terms of Service?

04:46 17 A. I don't understand how a message  
04:46 18 that a user wants to send to another friend --  
04:46 19 First of all, it's an unsolicited message; and  
04:46 20 second, I don't understand what this Terms and  
04:46 21 Conditions has anything to do with -- with -- I  
04:46 22 don't understand how the relevance to the  
04:46 23 questions.

04:46 24 Q. Did you have an understanding  
04:46 25 whether or not power.com to enabled its registered

04:47 1 and not only Facebook but the entire Internet, that  
04:47 2 what we were doing definitely has a pretty strong  
04:48 3 grounds to be value. Obviously, there's no legal  
04:48 4 precedent whatsoever anywhere that exists relating  
04:48 5 to this issue, so that's why I don't understand  
04:48 6 what this discussion is about.

04:48 7 Q. Mr. Vachani, whether you  
04:48 8 understand what it's about, my question is simply  
04:48 9 did Power have an understanding whether it was  
04:48 10 enabling registered users of Power to violate the  
04:48 11 Terms of Service of Facebook?

04:48 12 A. Let me be clear. You specifically  
04:48 13 asked about unsolicited communications and we did  
04:48 14 not send any unsolicited E mails or communications.  
04:48 15 Neither did our users. If our users wanted to send  
04:48 16 a message to their friend, they have the right to  
04:48 17 send a message or authorize the sending of a  
04:48 18 message. This is a -- This is something that it's  
04:48 19 commonplace and used by every site including  
04:48 20 Facebook as a core part of their business. That's  
04:48 21 why I don't understand why we're talking about  
04:48 22 unsolicited communications.

04:48 23 Q. Mr. Vachani, again, I asked simply  
04:49 24 -- you don't need to even look at the any of the  
04:49 25 bullet points. Did power.com, as of December 1st,

04:50 1 the question read back and then just answer the  
04:50 2 question.

04:50 3 A. So what's the question?

04:50 4 (Whereupon, the last question is  
04:50 5 read back by the reporter.)

04:50 6 MR. BURSOR: Is the question:  
04:50 7 Does he see that in the agreement?

8 MR. COOPER: Yeah, that's all I  
9 asked.

10 MR. BURSOR: Yeah, so do you see  
04:50 11 that -- do you see that --

04:50 12 A. I see that in the agreement.

04:50 13 MR. BURSOR: Yeah, so then you've  
04:50 14 answered the question.

15 A. Okay. Yeah, I see that in your  
04:50 16 agreement.

04:50 17 Q. Have you read that language as of  
04:50 18 December 1st, 2008?

04:50 19 A. Yes. I had read it many times.

04:50 20 Q. Had anybody else at power.com read  
04:50 21 that language as of December 1st, 2008?

04:50 22 A. I don't know if they read it. It  
04:51 23 was my job to read it and I think Filipe probably  
04:51 24 read it. Those are the two people that I know.

04:51 25 Q. As of December 1st, 2008, had you

04:56 1 I think she was one of the lawyers, but I could --  
04:56 2 Yeah.

04:56 3 Q. All right. All I'm just asking if  
04:56 4 you can recall the name of lawyers who handle --  
04:56 5 I'm not even asking any specific legal matter --

04:56 6 A. We did have counsel in the United  
04:56 7 States, and at a later point Wilson Sonsini was our  
04:56 8 lawyer after we moved from Skadden to Wilson  
04:56 9 Sonsini.

04:56 10 Q. Who at Wilson Sonsini?

04:56 11 A. I apologize. It was -- The  
04:56 12 interactions were not extensive with those  
04:56 13 companies.

04:56 14 Q. Besides Mr. Herrera, did you ever  
04:57 15 have any discussions with anybody at Power about  
04:57 16 Facebook's Terms of Service?

04:57 17 A. It would be with Eric.

04:57 18 Q. Eric Santos?

04:57 19 A. Eric and Filipe were the two  
20 primary people that I would consult on these  
21 issues.

22 Q. Okay. So Filipe --

04:57 23 A. Not on -- Primarily Filipe.

04:57 24 Q. Mr. Herrera, my understanding --  
04:57 25 Was he listed as general counsel by Power?



05:00 1 A. No. From Facebook. I received an  
05:01 2 E mail from Mr. Cutler.

05:01 3 Q. Did you receive the E mail or the  
05:01 4 letter from Facebook first?

05:01 5 A. The E mail.

05:01 6 Q. Did the E mail include this  
05:01 7 letter?

05:01 8 A. Yes. This was sent on December  
05:01 9 1st, if I remember correctly.

05:01 10 Q. All right. Going back to Exhibit  
05:01 11 107, could you turn to Page 9 of 107. Do you see  
05:01 12 the bottom of Page 9 there's a discussion of  
05:01 13 Facebook Connect?

05:01 14 A. Yes.

05:01 15 Q. As of December 1st, 2008, had  
05:01 16 Power ever evaluated whether they could use  
05:01 17 Facebook Connect to connect the Power site or  
05:01 18 integrate the Power site with Facebook?

05:02 19 A. Extensively.

05:02 20 Q. All right. And do you recall how  
05:02 21 long that evaluation lasted?

05:02 22 A. I don't remember, but we  
05:02 23 definitely talked about it, looked at it, and I  
05:02 24 made a conclusion that it did not in any way. It  
05:02 25 would not in any way enable the functionality that

05:02 1 our users were expecting from us.

05:02 2 Q. When did these -- How were these  
05:02 3 -- First of all, who were you referring to that we  
05:02 4 discussed this when you --

05:02 5 A. Typically, it would be in a weekly  
05:02 6 meeting. It would probably come up on the agenda,  
05:02 7 Facebook Connect, and Eric would usually lead this.  
05:02 8 He probably would have looked at -- with his team  
05:02 9 he would have evaluated and played with Facebook  
05:02 10 Connect to see what they could do and what its  
05:02 11 capable in evaluating stuff and would have reported  
05:02 12 on this at a meeting, at a weekly meeting.

05:02 13 Q. Who participated in these weekly  
05:02 14 meetings?

05:02 15 A. It would be members of program --  
05:02 16 members of the -- Typically, it would be management  
05:03 17 but if there was a specific person other than  
05:03 18 management that was necessary such as a member of  
05:03 19 the team, we would -- they would come in and  
05:03 20 consult on an issue.

05:03 21 Q. Let me be clear. Did you  
05:03 22 participate in these weekly meetings?

05:03 23 A. In many of them. Not all of them.

05:03 24 Q. Who do you recall besides yourself  
05:03 25 and Mr. Santos?

## C E R T I F I C A T I O N

I, PATRICIA MULLIGAN CARRUTHERS, a  
Certified Shorthand Reporter and Notary Public of  
the State of New Jersey and a Notary Public of the  
State of New York, do hereby certify that prior to  
the commencement of the examination the witness was  
sworn by me to testify as to the truth, the whole  
truth, and nothing but the truth.

I do further certify that the foregoing is  
a true and accurate transcript of the testimony as  
taken stenographically by and before me at the  
time, place, and on the date hereinbefore set  
forth.

I do further certify that I am neither of  
counsel nor attorney for any party in this action  
and that I am not interested in the event nor  
outcome of this litigation.



Patricia Mulligan Carruthers, CSR  
Certificate No. XI00780  
Notary Public of the State of New York  
Notary Public of the State of New Jersey

Dated: JULY 27, 2011

My commission expires October 28, 2015 (N.J.)  
My commission expires December 21, 2013 (N.Y.)

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FACEBOOK, INC.

9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 FACEBOOK, INC.,

14 Plaintiff,

15 v.

16 POWER VENTURES, INC. a Cayman Island  
17 Corporation; STEVE VACHANI, an  
individual; DOE 1, d/b/a POWER.COM,  
18 DOES 2-25, inclusive,

19 Defendants.  
20

Case No. 5:08-cv-05780 JW

**DECLARATION OF LAWRENCE  
MELLING IN SUPPORT OF  
FACEBOOK, INC.'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
ON COUNT 1 OF THE CAN-SPAM  
ACT**

Date: December 19, 2011  
Time: 9:00 A.M.  
Courtroom: 9, 19th Floor  
Judge: Honorable James Ware

21 **CONFIDENTIAL - FILED UNDER SEAL**  
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1 I, Lawrence Melling, declare as follows:

2 **I. SUMMARY OF FINDINGS**

3 1. I am a research engineer at Zeidman Consulting. I make this declaration in support  
4 of Facebook, Inc.'s Motion for Partial Summary Judgment On Count 1 Of The CAN-SPAM Act. I  
5 have personal knowledge of the matters stated herein, and if called as a witness could and would  
6 testify competently thereto. For my work on this matter, Zeidman Consulting is being compensated  
7 at a rate of \$200 per hour.

8 2. I have been retained to review and analyze the source code and databases produced  
9 by Defendants in this action. I reviewed code and databases produced by Defendants on August  
10 25-26, 29-30, September 6-7, and October 19 and 25, 2011. Copies of my "Power Source Code  
11 Inspection Log" maintained in accordance with the Protective Order entered in this case are  
12 attached hereto as **Exhibit B**.

13 3. Based upon the source code produced by Power to date, I have concluded the  
14 following: (a) Defendants developed software to extract user information including friends' lists  
15 from Facebook. Defendants designed their software to automatically send Facebook Event  
16 Invitations and post Power Invitations on Facebook users' Walls; (b) 39,137 Power users had  
17 Facebook accounts. Because of missing information, I was unable to quantify how many  
18 transactions took place between Power and Facebook; (c) The software that Power used to  
19 automatically create Event notifications and post Facebook Wall messages was used to create  
20 content on Facebook's website that would result in automated "spam" email messages being sent  
21 on Defendants' behalf to Facebook users; (d) Defendants' software initiated the sequence of events  
22 that resulted in these spam emails being sent to Facebook users; and (e) Defendants had built  
23 mechanisms designed to circumvent technical barriers – such as blocks of IP addresses – that  
24 Facebook put in place to block Power's access. Defendants' source code includes routines that  
25 create a list of proxy servers. These proxy servers are continuously monitored to determine if they  
26 are blocked by a website like Facebook.

27 **II. BACKGROUND**

28 4. This introductory section of my Declaration gives information about my

1 qualifications, as well as offers explanations of technical terms that are needed to understand this  
2 Declaration.

3 **A. Personal experience and background of Lawrence Melling**

4 5. I am a research engineer at Zeidman Consulting. I have over 30 years of executive  
5 management and engineering experience in developing new hardware and software technologies  
6 and bringing them to market. I have been engaged in applications engineering and marketing of  
7 electronic design automation (EDA) tools at major companies and small startups. I have also been  
8 involved in the development of sophisticated tools for source code and object code analysis for  
9 finding intellectual property infringement. My resume is attached as **Exhibit A** to this Declaration.

10 **B. Website**

11 6. A “website” is a location on the World Wide Web that contains a group of web  
12 pages typically created using a popular programming language called the Hypertext Markup  
13 Language (HTML). Websites are usually connected to each other using “hyperlinks,” and are made  
14 available to the public by an individual, company, educational institution, government body, or  
15 other organization. These web pages are hosted on one or more computers called “web servers”  
16 and are viewed by users on “client computers” that are connected to the web servers via the  
17 Internet. The web pages are viewed using an Internet browser, such as Microsoft’s Internet  
18 Explorer. In conjunction with this Declaration, I make extensive reference to two websites located  
19 at the Uniform Resource Locators (“URLs”) <http://www.facebook.com> (the “Facebook website”)  
20 and <http://www.power.com> (the “Power website”).

21 **C. Internet Browser**

22 7. An “Internet browser” or web browser is a typical client application used to navigate  
23 the Internet. The browser accesses information such as web pages, images, videos, and games from  
24 Internet servers. The URL is the “address” through which online information is located and  
25 retrieved by the user from her client computer. Servers may provide static information to an  
26 Internet browser or may dynamically generate the information that is transmitted to an Internet  
27 browser based on input from the user and the internal state of the server. The browser provides the  
28 graphical user interface (GUI) to the web pages on the server. However, some websites make use

1 of client-side software to offload processing from the server to use the client's computer. This is  
2 important because the browsers include functionality to execute client-side "web scripts," which  
3 concept I discuss below. Three popular Internet browsers in use today are: Microsoft's Internet  
4 Explorer, Mozilla's Firefox, and Google's Chrome.

5 **D. Client**

6 8. A "client" is a computer that makes a service request to a server (defined below); the  
7 server fulfills the request. Computer interactions using the client/server model are very common.  
8 For example, when an individual checks a bank account from his or her computer, a client program  
9 on the individual's computer forwards the request to a server program at the bank. The bank's  
10 program may respond, or it may in turn forward the request to its own client program that makes a  
11 request to another bank computer. With regard to the World Wide Web, the browser on an  
12 individual's computer is a client program. The client program can be used to access and control the  
13 data from a server-side database via the individual user's client computer. A client application can  
14 also be referred to as the "front-end" and the server application is often called the "back-end."

15 **E. Server**

16 9. A "server" is a computer on a network (such as an internal corporate network or the  
17 Internet) that is dedicated to a particular purpose; it stores information and performs critical  
18 functions. For example, a "database server" could store all of an organization's data on a single  
19 machine, while providing database services to multiple users anywhere in the office, or even the  
20 world, while also allowing access and control over the data. A typical "database server" will allow  
21 users to access their data through custom applications designed to meet their specific needs. Server  
22 software refers to software running on the server computer that "serves up" information to a client  
23 computer. With regard to the World Wide Web, a web server responds to web client requests to  
24 view web pages. These pages can be static (content does not change) or dynamic (content is  
25 determined when requested).

26 **F. Web Scripts**

27 10. "Web scripts" are written to generate dynamic web pages; that is, web pages with  
28 rapidly changing content and imagery or content that must be calculated for example to display the



1 total visitor count to a web site. Such scripts are written in a variety of scripting languages such as .  
2 PHP, CGI, Perl, and JavaScript. Some scripts run on the web server (server-side) while other  
3 scripts run on the user's machine (client-side). Of the languages mentioned, JavaScript is the  
4 language of choice for client-side scripting and is supported by all the Internet browsers popularly  
5 in use, while PHP, CGI, and Perl are popular for server-side scripting.

6 **G. Web Crawler or Spider**

7 11. A "web crawler" or "spider" is a computer program used to browse the Internet in a  
8 systematic, comprehensive way. Web crawlers are typically associated with search engines and are  
9 used to collect website information for search engine indexing. Nonetheless, spiders and web  
10 crawlers are now commonly being used to collect or "harvest" web page information for non-search  
11 related applications such as web scraping. Web scraping can be used to locate input fields and  
12 variable fields allow a program to automatically fill out forms to login, send messages, request  
13 information, or any other website activity initiated by filling out a form. Because web scraping  
14 often is employed by entities for unwanted or unlawful purposes (like Power's harvesting of user  
15 information such as "friends' lists," and similar data from Facebook in order to later use that  
16 information to send "spam" email and electronic mail messages), many website operators  
17 (including Facebook) publish Terms of Use provisions that prohibit the use of web scrapers on their  
18 websites by their registered users-.

19 **H. Computer Database**

20 12. A "computer database" consists not only of data, such as user names and addresses,  
21 but also consists of schema and procedures represented by source code. The term "schema" refers  
22 to the structure of the database including where to place the data, how to organize the data, and the  
23 relationships between the data. For example, customer names may be placed in a field called  
24 "Name" and that name may be in a table called "Customers." A table is like a spreadsheet and a  
25 field in that table corresponds to a particular column in the spreadsheet. In a database there are  
26 many different tables. Each customer name may have an associated table with fields that contain  
27 the customer's address, credit card number, account balance, and comments about the customer.  
28 The table names, field names, types of data in the fields, and relationships between different tables



1 and different fields constitute the schema of the database which is generated using special  
2 programming language such as the Structured Query Language, also known as SQL.

3 13. Procedures for manipulating the data may also be stored in the database. These  
4 procedures are also utilized in conjunction with a special programming language such as SQL.  
5 These “stored procedures” can be used by programs that access the database to manipulate the data  
6 in the database. For example, a stored procedure may exist to compute the average outstanding  
7 balance for a list of bank customers. A program that is written to access the database could also  
8 access the stored procedure in order to calculate this average.

9 **I. Source Code**

10 14. In computer science, “source code” is a kind of text that is written using the format  
11 and syntax of the programming language that it is being written in, and typically is the only format  
12 that is readable by humans. Computer programs can be written using complex instructions that  
13 look like English. For example, the instruction  $a = b * c + 2$  tells the computer to take the number  
14 stored in memory and represented by variable b, multiply that by the number stored in memory and  
15 represented by the variable c, add 2 and store the result in memory represented by the variable a.  
16 Similarly, the statement `printf(“Hello world!”)` tells the computer to print the words “Hello world!”  
17 to the computer screen. These high-level, English-like instructions are the “source code.” Computer  
18 programs are made up of many lines of source code and the process of writing these lines of code is  
19 called programming. Eventually these lines of source code are turned into instructions that a  
20 computer understands, consisting of sequences of electronic ones and zeroes. The process of  
21 turning human-readable source code into a file containing computer instructions is called  
22 “compiling” and is performed by a special computer program called a “compiler.” In some cases,  
23 source code is run directly by a computer, without creating any file of computer instructions.

24 **III. SCOPE OF OPINIONS**

25 15. Based on my background and experience and inspection to date of the source code  
26 produced by Defendants, I have been asked to provide my opinions and conclusions related to (1)  
27 whether Defendants’ source code contained evidence of attempts to access Facebook, download  
28 data from Facebook, contact Facebook, and/or establish invitations to events whereby Facebook

1 users would automatically receive email messages procured by Defendants can be ascertained at  
 2 this time from an initial review of the source code; and (2) whether Defendants developed  
 3 technology to circumvent blocks by Facebook and others of the IP addresses associated with the  
 4 Power website.

5 16. I have reviewed literally hundreds of thousands of lines of code to reach my  
 6 opinions. In addition, in reaching the opinions and conclusions discussed herein, I received,  
 7 considered, and/or relied upon the following materials, copies of which are not attached but can be  
 8 provided upon request:

- Power Source Code Documents which includes 299,763 lines of code,
- Four SQL Server database backup files.
- I used Understand by Scientific Toolworks, Inc. to help analyze the software.
- Microsoft SQL Server 2008 Express to extract the databases from the backup files and to review the database contents.
- Two PowerScript Source files extracted from the PowerScript\_bkp\_full.bak database backup file: PN\_SEND\_PRIVATE\_MESSAGE\_FACEBOOK and CREATE\_EVENT\_FACEBOOK
- Projetos\Power.PowerNetwork.Core\dal\AccountNetworkDAL.cs
- Projetos\src\configuration\ConfigurationPowerProxy.cs
- Java\PowerInfra\powerproxy\com\powerscrap\proxy\manager\UpdateServerListManager.java
- Java\PowerInfra\powerproxy\com\powerscrap\proxy\PowerProxy.java
- The transcript of the July 20, 2011 deposition of Steve Vachani.
- Facebook's source code for "Create and Event"
- Additional source code documents delivered on October 25, 2011.
- Additional databases delivered on October 19, 2011 and October 25, 2011.

#### 19 **IV. ANALYSIS**

20 17. Power's software, operated by Defendants, was responsible for initiating the  
 21 sequence of events that resulted in these spam electronic mail messages being sent to Facebook  
 22 users. Specifically, I have found that Defendants created software and expected to automatically  
 23 create Event notifications and post Facebook Wall messages was used to create content on  
 24 Facebook's website that resulted in automated "spam" electronic mail messages being sent on  
 25 Power's behalf to Facebook users.

26 18. For instance, one script in Defendants' code is called  
 27 CREATE\_EVENT\_FACEBOOK. This script created an Event on Facebook that promulgated  
 28 invitations to Facebook users by Defendants. That script automatically set Power as the host of the

1 event, and identified Power as the “location” for the event in Facebook’s Event tool. *See Exhibit*  
 2 **C**, CREATE\_EVENT\_FACEBOOK.xml, at lines 37 and 41.

3 19. The script also generated a guest list if one was not provided. To generate the guest  
 4 list, Defendants’ software accesses the user’s Facebook “friendsList” and extracts the user ID of  
 5 each friend to create the guest list. *See id.* at lines 46-51. The PowerShell executes this code, if no  
 6 guest list is provided, to automatically create a guest list from the user’s list of friends on Facebook.  
 7 Specifically, the PowerShell application checks a “variable” (a named element to store  
 8 information) called the Guestlist (“listaConvidados”), and then executes a sequence of  
 9 programming commands inside a “rule block,” identified by the beginning tag “<rule>” and  
 10 terminated by the ending tag “</rule>,” if it is empty. Through this process, the PowerShell  
 11 software creates a new variable called “friendsList,” and another variable called “ids,” which  
 12 combine to create the Event guest list made from one Facebook user’s list of Facebook “friends.”

13 20. The script also automatically sends Facebook Event invitations to each Facebook  
 14 user in the guest list on behalf of Power. *See id.* at lines 58-74.

15 21. I also looked to determine if Defendants, or the user, caused the “events” to be  
 16 initiated. From the code that has been provided to date, I could not locate any code in  
 17 CREATE\_EVENT\_FACEBOOK that requested the user’s approval to send the “event” invitations.  
 18 I also was unable to find any other code requesting that the user accept or approve sending the  
 19 Facebook Event invitations on behalf of Power.

20 22. The PowerShell software also created the text used to invite Facebook friends to  
 21 participate in the “100x100x100” campaign. The message contents were stored in resource files,  
 22 which are files used by Microsoft Visual Studio development tools to store information for access  
 23 by a program. Notably, in this example there were three resource files found with the same content  
 24 in three different languages: English, Spanish, and Portuguese. *See Exhibit D*,  
 25 PowerCallBack.aspx.en.resx, found in  
 26 SVN\power.com\Power.Com\Pub\Http\App\_LocalResources directory, at lines 132-137.

27 132 <data name="CAMPAIGNMESSAGE" xml:space="preserve">  
 28 133 <value>#BREAK##BREAK#I am competing for the \$100 prize in the

100x100x100 promotion and recommend you to participate  
too!#BREAK#Learn more at:</value>

134 </data>

135 <data name="CAMPAIGNMESSAGE2" xml:space="preserve">

136 <value>First 100 people who bring 100 new friends to Power.com  
earn \$100. Come and participate too:</value>

137 </data>

These files would only be here if the authors of the text created and authored it.

23. These strings include the actual language that was sent to Facebook users as a result of the Power.com website's execution of the "CREATE\_EVENT\_FACEBOOK" script. This excerpt shows the text string stored for CAMPAIGNMESSAGE and another for CAMPAIGNMESSAGE2 are both human-readable messages used in promoting the 100x100x100 campaign to Facebook users.

24. In the same resource file listed above, an additional human-readable messages generated by the PowerScript software also were used to invite Facebook friends to Power. *See Exhibit D* at lines 147-149. For example, I found the following code:

147 <data name="INVITEMESSAGE" xml:space="preserve">

148 <value>Hi ##friendname##,#BREAK#How would you like all your  
friends in just one place?#BREAK#Login to Power.com to  
discover all of its advantages and enhance your  
Internet experience.</value>

149 </data>

25. This excerpt shows a message string that includes a placeholder to insert a "friendname." This message was used in other electronic messages to registered Power users' Facebook friends through the Facebook system.

26. The alternative function that uses this "INVITEMESSAGE" string is named "SendMessageInviteToPower()." *See Exhibit D* at line 2623. The code excerpt below shows that the script "INVITEMESSAGE" is used to form the body of the message to be sent as part of the invitation. *See id.*, found in the SVN\power.com\Power.Com\Pub\Http directory, at line 2681.

```

2681 dataMessage.BodyMessage = Translate("INVITEMESSAGE")
    .Replace("##name##", name)
    .Replace("##friendname##", friendName)

```

This line of code retrieves the appropriate language translation for the “INVITEMESSAGE” (English, Spanish, or Portuguese) message, and then replaces the “friendname” placeholder in the text of the message that is sent with the actual friend’s name in order to complete the content of the invitation to join Power. Then at *id.*, line 2716, it calls the following function to send the message:

```
PowerMessageManager.SendMessage(dataMessage);
```

27. How the invitation is sent depends upon the network (*e.g.* Facebook) to which the invited friend belongs. The `PowerMessageManager.SendMessage()` method, which can be used to send invitations to users on Facebook, can be found starting at line 24 in the `PowerMessageManager.cs` file found in the `SVN\power.com\Power.Message.Core` directory, which is attached hereto as **Exhibit E**. The related `SendMessage()` code is responsible for calling the `PowerMessageFactory.CreatePowerMessage()`, attached hereto as **Exhibit F**, at line 42, and between the two scripts can ensure that Facebook users receive electronic mail invitations initiated by the Power website.

28. Further, a `CreatePowerMessage()` method that appears in the PowerScript code uses the relevant network name (*e.g.* “Facebook”) to determine how and where to send the electronic invitation. For the case where the network is Facebook, the following PowerScript code would be executed when PowerScript created Event invitations. *See id.*, `PowerMessageFactory.cs`, found in the `SVN\power.com\Power.Message.Core` directory, at lines 45-50. This code shows Power would actually send an electronic message to someone from Facebook inviting them to join the Power website, but would use the Power user’s email instead of Power. The code to send the message uses a PowerScript which posts the message to the Facebook Wall of the friend. The code to retrieve and execute the PowerScript can be found in `Write.cs`, found in the `SVN\power.com\Power.Message.Core\Engines` directory, which is attached hereto as **Exhibit G**, at

1 lines 87-94.

2 29. The code identifies the name of the PowerScript PN\_SEND\_SCRAP\_FACEBOOK  
3 as that which was used for initiating the electronic invitations to join Power. The code was  
4 retrieved from a database where it was added by using the following SQL command. See **Exhibit**  
5 **H**, InsertMessageScript.sql, found in SVN\power.com\Power.Message.Core\Database, at line 7.  
6 The PN\_SEND\_SCRAP\_FACEBOOK script itself was retrieved from the PowerScript database.  
7 See **Exhibit I**, PN\_SEND\_SCRAP\_FACEBOOK.pdf, at lines 1-23.

8 30. The PowerScript automatically posts the message content from the  
9 INVITEMESSAGE string to the Wall of a Facebook friend. Using these automatically generated  
10 messages, Power initiated electronic mail invitations for Facebook users to join the Power website.

11 31. In addition to the code analysis, I also examined the related databases provided in an  
12 effort to determine how many Facebook Event or Wall electronic mail messages were initiated by  
13 the PowerScript software. I determined that while certain of the databases were the ones of interest  
14 in which I would have expected to locate information about the numbers of electronic invitations  
15 that were sent by Power to Facebook, the databases produced by Power that should contain logs of  
16 the number of Events and Power invitations sent actually do not contain the information for the  
17 time period in question.

18 32. For instance, the Power database named Async is a log of PowerScript jobs run.  
19 The Async log would contain the information related to the number of electronic messages sent by  
20 the PowerScript software. The Async database found on the SQL 7 DVD only logged jobs from  
21 2/19/2011 to 4/1/2011, and the Async database in SQL 6 DVD was corrupted. However, the DVD  
22 that was provided that fixed the corrupted version only included logs from 08/03/2007 to  
23 11/23/2008 – which does not cover the December 2008 period when the Facebook activity was  
24 seen. Power has not offered a reason for why the data was missing after 11/23/2008.

25 33. In addition, I reviewed the content of the Power\_Logger database in the expectation  
26 that it might include the information about how many Facebook Events and Wall messages that the  
27 PowerScript software initiated. I did so because this database appears to include tables to log  
28 information about messages sent, including 10 MessageLog tables, a MessageLogHistory table, 10

1 Scraplog tables, and a ScraplogHistory table. Nonetheless, all these tables were empty except for  
 2 the ScrapLoghistory, which only had 141 entries from 12/6/2009 to 11/9/2010, all on the Orkut  
 3 network. Again, Power has not offered a reason for why the Facebook Event and Wall message  
 4 database information does not appear in the databases I reviewed.

5 34. Because the information about Events and Wall messages sent to Facebook during  
 6 December 2008 was not included in the databases I received from Power, I was unable to determine  
 7 precisely how many wall messages were posted and how many “Power 100” campaign event  
 8 notifications actually were sent to Facebook users. Besides the data missing from the time period  
 9 of interest, I also still don’t have the source code repository files so that I could examine the exact  
 10 revisions of the code used during the December 2008 time frame. I am aware such files have been  
 11 requested from Defendants. I myself made oral requests for them as early as August of 2011. I  
 12 have yet to be told where they are, or why they remain missing.

13 35. However, I also examined the Power database of the Power users, and I was able to  
 14 determine that there were at least 39,137 Power users with Facebook accounts in the database.

#### 15 **I. DEFENDANTS’ EFFORTS TO CIRCUMVENT IP BLOCKS**

16  
 17 36. I also uncovered evidence that Defendants implemented technology to circumvent  
 18 Facebook’s efforts to block the Power website. Specifically, -the latest delivery included the source  
 19 code files that run the CREATE\_EVENT\_FACEBOOK script. *See Exhibit J,*  
 20 *CreateCampaignEvent.cs* from *SVN\power.com\Power.Com.Core\Campaign100x100x100*  
 21 *directory*, at lines 25-40. In this code, the PowerScript retrieved and executed the  
 22 “CREATE\_EVENT\_FACEBOOK” script from one of Defendants’ servers. Significantly, the IP  
 23 address of the relevant server that executes the “CREATE\_EVENT\_FACEBOOK” script is set by  
 24 the Defendants’ proxy server software. This shows that the PowerScript software is monitored by  
 25 the Power.com system to ensure that it is not being blocked by Facebook as a result of creating  
 26 these Events.

27 37. Additionally, I investigated certain routines in the Power source code to determine  
 28 whether Defendants employed tools that allowed Power to circumvent technical barriers – such as

1 blocks of IP addresses – that Facebook or other websites put in place to block Power’s access to  
 2 their own websites. Certain ones that create a list of proxy servers, which are continuously  
 3 monitored to determine, among other matters, if they are blocked by a website like Facebook. I  
 4 have been able to identify connection-type methods in the source code that allow Defendants to use  
 5 a proxy server to change the IP addresses by the Power website that are visible to and are detected  
 6 by third parties like Facebook. By tracing the execution of a PowerScript, I found that part of the  
 7 process was to use ConfigurationPowerProxy to get a proxy server to use for connecting with  
 8 Facebook, in this example. The code found shows how an array of proxy servers is created from a  
 9 list provided by the proxy manager and then the server is selected randomly from that list. *See*  
 10 **Exhibit K**, ConfigurationPowerProxy.cs found in the  
 11 SVN\powerinfra\trunk\Projetos\src\configuration directory, at lines 20-26.

12 38. The Defendants’ source code includes routines I have identified that create a list of  
 13 proxy servers, which are continuously monitored to determine, among other matters, if they are  
 14 blocked by Facebook. The updateServerListThread shows the server list is updated on a regular  
 15 interval stored in the timeToUpdate property. *See* **Exhibit L**, UpdateServerListManager.java, at  
 16 lines 107-118.

17 39. While the previous routine is used to update the server list on regular intervals, there  
 18 are two other methods that are used to update the server list. The definirServidor method is used to  
 19 add a server to the list. The removerServidor method is used to remove a server from the list. *See*  
 20 **Exhibit M**, PowerProxy.java, at lines 82-108 and lines 112-135, respectively.

21 40. Finally the listen method at *id.* lines 144-165 monitors each proxy server and calls  
 22 the removerServidor routine if it detects a block of the Power website. The IP address of the Power  
 23 website can then be replaced with another IP address from the Power Proxy Manager. In this way,  
 24 Power can ensure that it can circumvent deliberate blocks of its services by entities such as  
 25 Facebook.

## 26 **V. DEFENDANTS HAVE DELETED IMPORTANT DATA**

27 41. Since first getting access to some code on August 23, 2011, I have continually found  
 28 deficiencies in the scope of code produced by Defendants. Despite repeated and diligent requests, I



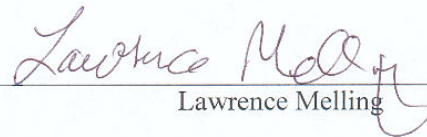
1 still have not received all of the Power database information associated with how many invitations  
2 were sent by Power. From correspondence from Mr. Fisher, I now believe this highly important  
3 information was deleted after this litigation was underway.

4 **VI. CONCLUSION**

5 42. Based on my analysis to date, Power developed software to extract information from  
6 Facebook which it used to automatically send Facebook Event Invitations and post Power  
7 Invitations on Facebook users' Walls. The software that Power used to automatically create Event  
8 notifications and post Facebook Wall messages could be used, and was used, to create content on  
9 Facebook's website that would result in automated "spam" email messages being sent on Power's  
10 behalf to Facebook users. It was Power's software that initiated the sequence of events that  
11 resulted in these spam emails being sent to Facebook users.

12 43. It is my understanding that discovery in this case is ongoing. Accordingly, I reserve  
13 the right to supplement or amend my opinions in light of any additional evidence, testimony, or  
14 information that may be provided to me after the date of this report. I also reserve the right to  
15 supplement or amend my opinions in response to any expert reports served by any other party in the  
16 lawsuit.

17 I declare under the penalty of perjury under the laws of the United States of America that  
18 the foregoing is true and correct. This Declaration is executed on this 14th day of November,  
19 2011, at Cupertino, California.

20   
21 Lawrence Melling

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9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 FACEBOOK, INC.,

14 Plaintiff,

15 v.

16 POWER VENTURES, INC. a Cayman Island  
17 Corporation; STEVE VACHANI, an  
individual; DOE 1, d/b/a POWER.COM,  
18 DOES 2-25, inclusive,

19 Defendants.

Case No. 5:08-cv-05780 JW

**DECLARATION OF JOSEPH  
CUTLER IN SUPPORT OF  
FACEBOOK, INC.'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
FOR LIABILITY UNDER THE CAN-  
SPAM ACT**

Date: December 19, 2011  
Time: 9:00 a.m.  
Judge: Hon. James Ware  
Courtroom: 9, 19th Floor

20 CONFIDENTIAL – FILED UNDER SEAL  
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DECLARATION OF RYAN MCGEEHAN  
5:08-cv-05780 JW

1 I, Joseph Cutler, declare as follows:

2 1. I make this declaration in support of Facebook, Inc.'s Motion for Partial Summary  
3 Judgment For Liability Under the CAN-SPAM Act. I have personal knowledge of the matters  
4 stated herein, and if called as a witness could and would testify competently thereto.

5 2. I am an associate at the Seattle, Washington office of the law firm Perkins Coie  
6 LLP. I am a member of the firm's litigation group. In that role, I have in the past been engaged  
7 by the Plaintiff in this case, Facebook, Inc, ("Facebook"), to help it take legal action against  
8 illegal spamming, phishing, and other forms of malicious Internet behavior.

9 3. Along with Facebook's in house counsel (Sam O'Rourke) and Facebook's internal  
10 technical team (such as Ryan McGeehan), I was involved in the original investigation of the  
11 activities related to the commercial website located at [www.power.com](http://www.power.com).

12 4. On or about December 1, 2008, I investigated the activities related to a website  
13 located at the IP address 70.38.96.7. The commercial website located at that address had the  
14 URL <http://www.power.com> ("Power's website").

15 5. When I was first engaged, I visited the Power.com website. I found that the Power  
16 website asked for my usernames and passwords, including my Facebook username and password.  
17 I also found that the Power website displayed Facebook user data and Facebook's trademarked  
18 logo.

19 6. Based upon my investigation, on December 1, 2008, I prepared a Cease and Desist  
20 letter. I sent the letter to the apparent owners of the Power website advising them of their legal  
21 violations. A true and accurate copy of that Cease and Desist letter is attached hereto as **Exhibit**  
22 **A**.

23 7. Following my sending the cease and desist letter, I was contacted by Power  
24 Ventures' CEO, Steve Vachani. Mr. Vachani said he was the owner of Power Ventures, that he  
25 operated the Power website, and that he had the ability to continue or cease Power's activities.

26 8. In December 2008 through early 2009, I had numerous discussions with Mr.  
27 Vachani about the functionality of the Power website. Through our discussions and additional  
28 investigation, I learned of numerous other activities by Defendants, and I also asked that those

1 activities stop. In nearly all of our discussions, I continued to demand that Defendants cease their  
2 unlawful activities. Our discussions occurred via email as well as on the telephone.

3 9. During our discussions, Mr. Vachani repeatedly assured me that the functionality  
4 of the Power website would be changed to comply with Facebook's requests and that the Power  
5 website's connection to Facebook would use Facebook's authorized "Facebook Connect" service.  
6 Despite his repeated assurances, Mr. Vachani failed to make the changes to the Power website  
7 that he had committed to make. One example is described below.

8 10. On or about December 12, 2008, Facebook implemented technical measures to  
9 limit access from Power's website to Facebook by blocking the IP address that the Power website  
10 used to connect to Facebook. On the same day, I received an email from Mr. Vachani wherein he  
11 agreed that the Power website would be modified to connect to Facebook using the authorized  
12 "Facebook Connect" technology and that all user data gathered from Facebook to date would be  
13 deleted and purged from their systems. In that email, Mr. Vachani estimated that it would take  
14 two weeks to complete the change to Facebook Connect.

15 11. On December 15, 2008, I sent an email to Mr. Vachani responding to his  
16 December 12, 2008 email. In that message, I reconfirmed that Facebook expected the Power  
17 website to delete all user data and to fully comply with the Facebook Connect policies and all  
18 other applicable Facebook Terms of Use and guidelines within two weeks, or by December 26,  
19 2008.

20 12. On or about December 26, 2008, instead of finding that the Power website had  
21 been changed to comply with Facebook's terms as Mr. Vachani had promised me it would, I  
22 learned that the Power website had purposely circumvented Facebook's latest IP blocking  
23 measures to continue its unauthorized access to Facebook by moving the services used to access  
24 Facebook to a shared IP address owned by Amazon.com.

25 13. On December 27, 2008, I received an email from Mr. Vachani informing me that  
26 he and Power Ventures would not honor his earlier promises to me. Instead, the email notified  
27 Facebook that the Power website would not remove any Facebook content, would not use the  
28 authorized Facebook Connect implementation, and would not discontinue its spam campaign



1 aimed at soliciting Facebook users to join the Power Website. A true and correct copy of the  
2 email I received from Mr. Vachani informing me of this decision is attached hereto as **Exhibit B**.

3 14. Left with no recourse, Facebook filed the present suit on December 30, 2008. I  
4 prepared a chronology of the events that led to this action, including an accurate characterization  
5 of my discussions with Mr. Vachani, which is attached hereto as **Exhibit C**. After Facebook filed  
6 suit, it continued its attempts to reach an agreement with the owners of the Power website to stop  
7 its violations of the company's Terms of Use. Those efforts are also reflected in the attached  
8 chronology.

9 15. From the late fall of 2008 until early 2009, I estimate that Facebook spent  
10 approximately \$75,000 on my firm related to Defendants' actions. In December alone, Facebook  
11 incurred approximately \$5,059 for my time associated with Defendants activities. I also know  
12 that Mr. O'Rourke and Mr. McGeehan dedicated substantial additional time to address  
13 Defendants' actions.

14 I declare under the penalty of perjury under the laws of the United States of America that  
15 the foregoing is true and correct. This Declaration is executed on this 14th day of November,  
16 2011, at Seattle, Washington.

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---

Joseph Cutler

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 FACEBOOK, INC.,

14 Plaintiff,

15 v.

16 POWER VENTURES, INC. a Cayman Island  
17 Corporation; STEVE VACHANI, an  
individual; DOE 1, d/b/a POWER.COM,  
18 DOES 2-25, inclusive,

19 Defendants.

Case No. 5:08-cv-05780 JW

**DECLARATION OF RYAN  
MCGEEHAN IN SUPPORT OF  
FACEBOOK'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
ON COUNT 1 UNDER THE CAN-  
SPAM ACT**

Date: December 19, 2011  
Time: 9:00 a.m.  
Judge: Hon. James Ware  
Courtroom: 9, 19th Floor

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21 CONFIDENTIAL – FILED UNDER SEAL  
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DECLARATION OF RYAN MCGEEHAN  
5:08-cv-05780 JW

I, Ryan McGeehan, declare as follows:

1. I make this declaration in support of Facebook, Inc.'s Motion for Partial Summary Judgment pursuant to the CAN-SPAM Act, 15 U.S.C. § 7701 et seq. I am the Security Manager at Facebook in Facebook's Security Incident Response team ("SIR"). I have personal knowledge of the matters stated herein, and if called as a witness could and would testify competently thereto.

**A. Facebook Services and Users**

2. Facebook owns and operates the popular social networking website located at the universal resource locator ("url") <http://www.facebook.com>. In 2008, Facebook had approximately 132 million active users. This user base has grown significantly during the last few years. Presently, Facebook has over 800 million monthly active users.

3. Facebook users are offered a number of different kinds of online messaging tools, such as private messaging, posting of messages on another user's Facebook "wall" or "timeline," status updates, and "Event" invitation messages. Facebook's "Events" are one of the many messaging tools provided by Facebook. Facebook "Events" are entries on an electronic calendar that reside on the Facebook website, and to which Facebook assigns a unique Event identification number ("eid") that appears in the url associated with the Event. A user can create a calendar entry and then send his or her friends invitations through the website to attend the Event. If the user has notifications enabled, the invitation to the Event also generates an electronic mail message sent to the Facebook user's email address notifying the recipient of the invitation to the Event.

**B. Business Enterprises Target Facebook And Its User Base**

4. Facebook takes great measures to protect its user experience. Facebook's popularity and immense user base attracts many outside business enterprises that seek to interact with Facebook's ever-growing user population. Some of the business enterprises send messages that are unauthorized by Facebook and interfere with the user experience. We refer to such messages as "spam." "Spam" messages often contain false and misleading header information –

whether in the electronic messages sent through Facebook, such as Event messages, or in the email notifications automatically generated by Facebook triggered by the spam message. As Facebook has grown, Facebook has also seen a concomitant increase in activity by entities that improperly use Facebook to send spam messages to Facebook users. These spam messages tax Facebook's system because there is a finite volume of mail that Facebook can handle without further investment in infrastructure.

5. These spam messages detract from the overall Facebook experience and are sometimes a source of complaints by Facebook users. For instance, in the fourth quarter of 2008, Facebook received 71,256 "tickets" (*i.e.*, complaints by users) that used the word "spam" in them.

**C. Facebook Invests Resources To Protect Its User Experience**

6. Facebook has committed substantial resources to ensure a positive Facebook experience. Some of the efforts taken by Facebook are described below.

a. **Human Resources.** In late 2007 or early 2008, Facebook created SIR. SIR is responsible for protecting the user experience from security attacks. Part of SIR's job is to deal with problems associated with spam attacks on Facebook. Our responsibilities include identifying the source of spam, analyzing the complexity of spam attacks, and determining the best method to prevent and contain spam attacks. Based upon this information, we stop spam manually and through implementation of new technologies.

b. **Technical Development.** Facebook also uses technical measures to prevent spammers from accessing the Facebook website and services. Facebook develops and employs software designed to block access to links identified as abusive from the IP address or addresses where it determines the spam has originated. This system is called the "Facebook Immune System" ("FIS"). Thanks to FIS and other systems, Facebook currently has been able to limit the amount of spam reaching the website's users to approximately less than one percent of the site's population.

c. **Terms of Use and Cease and Desist Letters.** Facebook also relies on its terms of use and cease and desist letters to protect the Facebook user experience. For example, Facebook publishes and enforces policies prohibiting spam by its users. A copy of the version of



1 Facebook's Terms of Use in effect on December 1, 2008 is attached hereto as Exhibit 1. At all  
2 times during 2008, Facebook's Terms of Use were posted on its website and prohibited the  
3 transmission of spam. Facebook also regularly sends out cease and desist letters to those  
4 spamming its users, notifying them that their conduct is unauthorized and unlawful. Facebook  
5 also asks its users to report "spam or scams" or any suspicious looking activity on Facebook.

6 d. **Court Intervention.** Where Facebook is unable to stop the spammer via  
7 cease and desist letters and other efforts, it often turns to the court system. Facebook has filed  
8 numerous lawsuits alleging violations of the CAN-SPAM Act, the Computer Fraud and Abuse  
9 Act ("CFAA"), and California Penal Code Section 502 in its effort to enjoin the conduct, deter  
10 further activity by others, and prevent damage to its systems, disruption of the users' experience  
11 and reduce harm to Facebook's goodwill.

12 **D. Defendants' Efforts To Access Facebook And Send SPAM To Users**

13 7. On or around December 1, 2008, following an initial half-day investigation, SIR  
14 determined that the website located at the url <http://www.power.com> ("the Power website") was  
15 running an automated scripting routine to crawl and scrape the Facebook website to harvest and  
16 download user data to the Power website. We believed that the purpose of the scripting routine  
17 was to "proxy" Facebook – that is, we believed that Power sought to enable users to log into  
18 Facebook through an IP address belonging to the Power website. I observed that the Power  
19 website also displayed the Facebook logo as part of such proxying. Such conduct violates  
20 Facebook's terms of use. As a result of this initial investigation, Facebook began a more detailed  
21 investigation of the harvesting and use of Facebook user data by the operators of the Power  
22 website.

23 8. In the course of investigating the Power website's harvesting of Facebook user  
24 data and proxying of the Facebook website, Facebook learned that communications from the  
25 Power website initiated a marketing campaign whereby the scripting routine running on the  
26 Power website automatically created Facebook Events that resulted in the Power website  
27 spamming Facebook users. Normally, when a user creates an Event, they select a name, date,  
28 time, location, provide a title and select invitees from their friends. The invitees then receive a

1 message that they have been invited to the Event and, if they have notifications enabled, they  
2 receive an email with the Event details. My understanding is that Power used automated software  
3 to complete these steps and invite all of the user's friends to an arbitrary Event requesting they  
4 register as users of the Power website. I also understand that this marketing scheme used other  
5 forms of Facebook electronic messaging to solicit Facebook users to join the Power website, such  
6 as direct Facebook messaging solicitations.

7 9. I had occasion to review an example of electronic messages Power caused to be  
8 sent via its marketing promotion. The electronic messages came from Facebook as they included  
9 the term "Facebook" in the "from" lines. Moreover, "@facebookmail.com" addresses were  
10 included both with the Event eid and the eventmaster emails sent to users, and the phrase "The  
11 Facebook Team" showed up in the signature lines of these messages. These messages would not  
12 have been sent except for Power's actions accessing users' accounts, generating all the content  
13 contained in the messages, placing them on the Facebook system, and automatically causing them  
14 to be sent through their proxying activities.

15 **E. Facebook Tried To Stop Defendants' Spamming Activities**

16 10. The Power website's activities had the potential to harm Facebook's goodwill, and  
17 likewise the activity was violating Facebook's Terms of Use. I immediately consulted  
18 Facebook's in-house legal department to notify them of my findings. I then also met with  
19 Facebook's "Site Integrity" team to determine the best methods by which to stop the Power  
20 website's attack, and to prevent further attacks. The Site Integrity team is responsible for  
21 ensuring the integrity of Facebook by employing various measures to end and prevent incursions,  
22 spam, scraping, fake account creation, malware distribution, and other harmful activities. I was  
23 part of a weekly meeting of engineers that included members of the Site Integrity team, and  
24 which regularly discussed throughout the month of December 2008 the Power website's activities  
25 aimed at Facebook, including the spamming of Facebook users. Those discussions also included  
26 how we could stop the Power website from proxying Facebook and block its unauthorized access  
27 to Facebook.

28

1           11. I am aware that on or after December 1, 2008, Facebook's outside counsel sent to  
2 the individuals associated with operating the Power website a Cease and Desist letter demanding  
3 that they cease connecting to Facebook without Facebook's permission and without compliance  
4 with Facebook's Terms of Use. In conjunction with that act, I personally was asked to investigate  
5 the source of the spam.

6 **F. Facebook Suffered Harm**

7           12. Stopping the activity originating from Power.com was a substantial effort taking a  
8 considerable amount of time. My investigation included analyzing the complexity of the attack  
9 was, and involved a substantial amount of my time being spent determining how much effort was  
10 needed to contain the spamming. Part of that effort required SIR to determine how many IP  
11 addresses were being used to send spam, and also if other spam was coming from those IP  
12 addresses. Due to the numerous methods used by the Power website to connect to and spam the  
13 site in conjunction with its marketing scheme, Facebook is not certain exactly how many  
14 electronic messages were generated by the Power website's automated software. However, we  
15 determined that at least 60,627 Event invitations appear to have been sent to Facebook users  
16 through the Facebook system due to the Power website's spamming activities and adversely  
17 affected Facebook. Notably, this number does not include Events created by the Power website  
18 that were deleted by affected users. Because the use of Event electronic messages was not the  
19 exclusive way that the Power website solicited Facebook users, it is likely significantly more  
20 electronic messages were sent, however, and both taxed and adversely affected the Facebook  
21 network.

22           13. Because the Power website did not stop connecting to Facebook even after  
23 Facebook's counsel sent its owners and operators the cease and desist letter, on or about  
24 December 12, 2008, Facebook decided to block the Power website's access to Facebook by  
25 blocking what appeared to be the Power website's primary IP address of 70.38.96.7. Following  
26 this block, however, Facebook determined that the Power website was circumventing the block  
27 by changing its primary IP address to other IP addresses. Facebook tried to block these IP  
28 addresses too in a game of "cat and mouse."

1           14.     On or about December 22, 2008, my own further investigations revealed that the  
2 Power website had again circumvented Facebook's blocks and resumed establishing connections  
3 to Facebook through new IP addresses associated with a shared amazon.com server. Due to  
4 Amazon's configuration, the new IP addresses that Power utilized were shared with numerous  
5 innocent third parties, some of whom could be Facebook users and/or application developers. We  
6 could not block these IP addresses without also blocking the innocent third parties. Facebook  
7 therefore elected not to block these IP addresses.

8           15.     On or about December 31, 2008, I learned that Power supposedly had removed  
9 "compatibility" with Facebook, and ceased to connect to the site via the IP address associated  
10 with the amazon.com hosted servers. However, on January 5, 2009, SIR was able to determine  
11 that there continued to be hundreds of instances of login activity from IP addresses associated  
12 with Power.com. I attach hereto as Exhibits 2 and 3 a copy of my records (FBPOWER0007 &  
13 FBPOWER0008-26) ) reflecting that continued login activity.

14           16.     In early 2009 Facebook blacklisted the term "power.com," which prevented the  
15 term from appearing anywhere on the Facebook website. That block remains in use.

16           17.     In addition to the many hours of time I spent investigating and discussing with  
17 Facebook personnel the problems associated with the Power website's proxying of Facebook, I  
18 estimate I spent at least three to four days of my own engineering time addressing other security  
19 issues Power presented for Facebook and its users. I attach hereto as Exhibit 4 a true and correct  
20 copy of the "ticket" called "Power.com contact importer" (FBPOWER0001-4) that I generated  
21 between December 1, 2008 and March 23, 2009 from my activities aimed at stopping the Power  
22 website's proxying of Facebook and spamming of Facebook users, including Facebook's attempts  
23 to block Power's access to Facebook's website.

18. I am aware that Facebook filed this lawsuit on December 30, 2008, after having made numerous attempts to stop Power from accessing Facebook's website and sending spam messages to its users and to integrate with Facebook in a manner consistent with Facebook's terms of use.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 13th day of November 2011 at Palo Alto, California.

  
Ryan McGeehan

Pages 1 - 10

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE

FACEBOOK, INC., )  
)  
Plaintiff, )  
)  
VS. ) NO. C 08-5780 JW (JCS)  
)  
POWER VENTURES, INC., )  
) San Francisco, California  
Defendant. ) Friday  
) November 4, 2011  
\_\_\_\_\_) 1:30 p.m.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**For Plaintiff:** Orrick, Herrington & Sutcliffe  
1000 Marsh Road  
Menlo Park, California 94025  
**BY: INDRA NEEL CHATTERJEE, ESQ.**  
**MORVARID METANAT, ESQ.**

**For Defendant:** Bursor & Fisher, P.A.  
1900 North California Boulevard  
Suite 940  
Walnut Creek, California 94596  
**BY: LAWRENCE TIMOTHY FISHER, ESQ.**

**Also Present:** Steven Vachani

**Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR**  
Official Reporter - US District Court  
Computerized Transcription By Eclipse

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P R O C E E D I N G S

NOVEMBER 4, 2011

1:36 p.m.

**THE CLERK:** Calling Case No. C08-5780, FaceBook  
versus Power Ventures.

**MR. FISHER:** Good afternoon, your Honor. Timothy  
Fisher for the defendants.

**THE COURT:** Mr. Fisher, welcome.

**MS. METANAT:** Your Honor, Morvarid Metanat and Neel  
Chatterjee for plaintiff Facebook.

**THE COURT:** Welcome, welcome. So you probably caught  
the gist of where I'm going from our last discussion. I  
don't -- having reviewed the papers, I think the search was  
transparently inadequate, both in the sense of figuring out  
what the scope ought to be in terms of what computers, email  
accounts, et cetera are to be searched and the rigor with which  
they were searched, and -- and the rigor with which they were  
searched.

I also think that it's clear that all the  
interrogatories that were done, were answered, were inadequate.

So what I want to do is order additional production  
and additional interrogatories as sought, but I want to figure  
out what that means. So what I was going to do -- and I know  
that your client is showing up soon, but I want you to start  
thinking about it now -- is order you all to go into the jury

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1 room and start working out a protocol. The protocol must have  
2 what's going to be searched, where, by whom and how. In other  
3 words, who is going to do it, under what supervision, with what  
4 search terms, et cetera, so that we have a true search for  
5 electronics because it's pretty clear to me that this was  
6 inadequate both from the way it was done and described by the  
7 defendant, by the individual who runs the defendant, and by the  
8 fact that so many other things are showing up in other email  
9 accounts, et cetera, et cetera.

10 So that's what I propose to do. I'm happy to hear  
11 some discussion of that, if you want, or you can just go in  
12 there and work it out.

13 **MR. FISHER:** Sure, your Honor. Following the  
14 telephonic conference last week, we contacted our client and he  
15 began immediately searching for additional documents. And this  
16 week we've produced a substantial amount of additional  
17 documents, several hundred. I think about 700 emails were  
18 produced, 50 PowerPoint presentations, internal software  
19 manuals and a variety of other things like that. More than  
20 five gigabytes of documents were turned over to Facebook on  
21 Tuesday or Wednesday of this week, because we wanted to produce  
22 them in advance of the hearing today so they would have some  
23 time to review it.

24 We're happy to sit and talk with them about  
25 additional things that they would like. As I indicated to the

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1 clerk, my client is on his way from Brazil to be here so that  
2 he can participate in the discussions.

3 **THE COURT:** Excellent. As soon as he comes in, we'll  
4 send him in to talk to you.

5 **MR. FISHER:** All right. Wonderful.

6 **THE COURT:** You understand why the fact that you have  
7 produced five gigabytes of material in the last two weeks might  
8 make me less comfortable, not more comfortable.

9 **MR. FISHER:** I understand, your Honor.

10 **THE COURT:** Right? So let's talk about protocol as  
11 well.

12 Okay? So don't leave without talking to me. You're  
13 welcome to go into my jury room. It's very comfortable. There  
14 are probably some jury snacks in there, some stale cookies. Is  
15 it unlocked?

16 **THE CLERK:** Yes.

17 **THE COURT:** See you later.

18 **MS. METANAT:** Your Honor, if I could make one  
19 request? There is another matter coming on for case  
20 management. If somebody could just get me for it when the need  
21 arises?

22 **THE COURT:** Sure, yes.

23 **MS. METANAT:** Thank you, your Honor.

24 (Whereupon there was a recess in the proceedings  
25 from 2:40 p.m. until 3:35 p.m.)

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1 (Mr. Steven Vachani present.)

2 **THE CLERK:** We're back on the record. Recalling case  
3 No. C08-5780, Facebook versus Power Ventures.

4 Counsel, state your appearances please.

5 **MR. CHATTERJEE:** Neel Chatterjee and Morvarid Metanat  
6 for Facebook.

7 **MR. FISHER:** Good afternoon your Honor. Timothy  
8 Fisher for defendants. And my client Mr. Vachani is here in  
9 the courtroom.

10 **THE COURT:** Excellent. So what did you on come up  
11 with.

12 **MR. CHATTERJEE:** Okay, your Honor. So I think what  
13 I'll do is I'll kind of go through what we've agreed to and  
14 then what I'd like -- I'll make a couple requests that are  
15 pretty straightforward at the end.

16 **THE COURT:** I need to be upstairs with Judge Breyer  
17 in seven minutes.

18 **MR. CHATTERJEE:** I will finish in seven minutes.

19 So Mr. Vachani has represented to us that there are  
20 two places where electronic documents and evidence will be  
21 located. One is an on-line backup drive called the ASA Drive,  
22 and then the other is -- he says all of the emails that he  
23 receives are forwarded to his Yahoo email account.

24 He has said that he has changed laptops about 10  
25 times over the past several years, so his current laptop is

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1 only about a week old and does not have any documents related  
2 to this dispute.

3           What Mr. Vachani and Power has agreed to do is give  
4 us access to the ASA Drive and the email account, and he'll  
5 give us the passwords and whatever access information we need  
6 to evaluate it by next Wednesday.

7           There is also one remaining issue on some code  
8 production that was ordered. We sent them an email today about  
9 that, and they will give us a response to what the status of  
10 the things we believe are missing is by next Wednesday.

11           The one thing that we request is that Mr. Vachani  
12 somehow affirm to your Honor that those two places, the Yahoo  
13 email account and the ASA Drive, are the only places where  
14 documents may be maintained that are related to this lawsuit.  
15 Mainly because if we find out that that's untrue, we want to  
16 have some vehicle to hold him accountable.

17           **THE COURT:** Okay. Is that all right?

18           **MR. FISHER:** That's fine, your Honor.

19           **THE COURT:** All right. Mr. Vachani, why don't you  
20 come up here?

21           **MR. VACHANI:** Sure.

22           **THE CLERK:** Raise your right hand, please.

23           (Whereupon, Defendant Steven Vachani was  
24 placed under oath.)

25           **MR. VACHANI:** I do.

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1           **THE COURT:** All right. I understand that you've  
2 represented to the defendants that the only places --

3           **MR. FISHER:** Plaintiffs, your Honor.

4           **THE COURT:** Plaintiffs, sorry. Thank you.

5           **MR. CHATTERJEE:** I know. I'm normally on the other  
6 side of the room.

7           **THE COURT:** I'm confused.

8           I understand that you have represented to counsel for  
9 the plaintiffs that the only place where electronic information  
10 is stored that might have any conceivable relevance to this  
11 dispute with Facebook is on the ASA Drive, which I understand  
12 is online?

13           **MR. VACHANI:** It's an on-line backup of all of our  
14 servers.

15           **THE COURT:** Online backup drive. Or on your Yahoo  
16 email account.

17           **MR. VACHANI:** It's where all emails that I've sent or  
18 received in the last five years for all accounts are all there.

19           **THE COURT:** So there wouldn't be any -- all existent  
20 electronic information that might have any relevance to this  
21 dispute that exists in the world, there would -- the  
22 only place, if it exists, it can be found on one of those two  
23 sources.

24           **MR. VACHANI:** That pertains to me. Something that I  
25 have sent or received. They have already gone through the

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1 process with every other relevant person. So anything that  
2 relates to me.

3 **MR. CHATTERJEE:** Or Power.

4 **MR. VACHANI:** Well, I can't speak for every single  
5 employee of Power, 150 employees.

6 **MR. CHATTERJEE:** So...

7 So, your Honor, the issue here is the employees are  
8 gone. The representation is that everything that would be  
9 within Power Venture's control, custody or control, are those  
10 two things.

11 **MR. VACHANI:** Yes. This is what is in Power Ventures  
12 control, correct.

13 **THE COURT:** Let me do it again.

14 **MR. CHATTERJEE:** Thanks.

15 **THE COURT:** Is it true that everything, every bit or  
16 byte of electronic information that is in any way related to  
17 this dispute that is either within your control or within the  
18 control, custody and control of Power Ventures, Inc., copies of  
19 all that electronic information, to the extent exists anywhere  
20 in the world, would be on one of these two sources, the ASA  
21 Drive or use who email account, is that correct?

22 **MR. VACHANI:** That's correct.

23 **THE COURT:** Okay.

24 **MR. CHATTERJEE:** Thank you, your Honor.

25 **THE COURT:** So I will order -- I'm granting the

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1 motion. You'll see it's reflected and I'll order the protocol  
2 that's been suggested; that the defendants are given access to  
3 the ASA Drive and to the Yahoo email account with passwords and  
4 anything you need to get into them by next Wednesday and  
5 respond -- and, also, respond regarding the code issue so that  
6 that can be worked out by next Wednesday as well.

7 **MR. VACHANI:** Can I make one statement?

8 I believe between now and Wednesday when we provide  
9 anything, I'm going to obviously -- to the best of my  
10 knowledge, these are the two places. I'm going to -- if there  
11 are any other changes between now and Wednesday, I'll let you  
12 know.

13 **THE COURT:** I'll let them know.

14 **MR. VACHANI:** I'll let them know so you can document  
15 the record, but if there is no other thing, then you can take  
16 his statement.

17 **MR. CHATTERJEE:** And, your Honor, just to make sure  
18 it's clear. Once we get access, we can also get information,  
19 like produce the documents and --

20 **THE COURT:** You get access so that you can search  
21 them and examine them and take copies.

22 **MR. CHATTERJEE:** Thank you, your Honor.

23 **MR. FISHER:** Your Honor, just for the record, also,  
24 we're not waiving -- Mr. Vachani's email does include a number  
25 of privileged communications. So we're not waiving privilege

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1 or ability to designate under the protective order.

2           **THE COURT:** Designate appropriately under the  
3 protective order to preserve the privilege so there's no issue.  
4 Okay.

5           **MR. CHATTERJEE:** Thank you, your Honor.

6           **MR. FISHER:** Thank you.

7           **THE COURT:** Thank you.

8 (Whereupon, further proceedings in the  
9 above matter were adjourned.)

10  
11                               --oo--  
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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 08-5780 JW (JCS), FACEBOOK, INC. vs POWER VENTURES, et al were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

\_\_\_\_\_  
/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Monday, November 21, 2011

*Debra L. Pas, CSR, CRR, RMR, RPR*  
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Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

Case No. 5:08-cv-05780

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

Defendants.

**AMENDED ANSWER AND  
COUNTERCLAIMS OF  
DEFENDANTS POWER  
VENTURES, INC. AND STEVE  
VACHANI**

AMENDED ANSWER AND COUNTERCLAIMS OF DEFENDANTS POWER VENTURES, INC. AND  
STEVE VACHANI

Defendants Power Ventures, Inc. and Steve Vachani (hereafter collectively referred to as “Defendants” or “Power”) hereby answer the First Amended Complaint (“Complaint”) filed by Plaintiff Facebook, Inc. (“Facebook”).

## I. INTRODUCTION AND BACKGROUND

Power believes in a borderless Internet where users have the right to own and control their own data. Indeed, Power recently published an Internet User Bill of Rights detailing three fundamental rights of Internet users that must be protected – rights to ownership, control and privacy. Power’s Internet User Bill of Rights details these three fundamental rights as follows:

### **Ownership**

The right to complete and total ownership of their content—including profiles, messages, media, contacts and all other data.

### **Control**

The right to access, disseminate, transfer or aggregate their content on any platform, or to authorize third-parties to do so for them.

### **Privacy**

The right to protect their content and personal information from other users and corporate entities alike.

Power’s core mission is to protect and to defend these rights and to provide users with the tools they need to exercise them. Facebook, on the other hand, has attempted to thwart its users’ ability to exercise these rights with respect to their own data.

The bulk of the Facebook site is comprised of “User Content.” This “User Content” includes “photos, profiles, messages, notes, text, information, music, video, advertisements, listings, and other content that [users] upload, publish or display” on the Facebook site. This data is not owned by Facebook. It is owned by the user. Although users’ ownership of their own data seems self-evident, and it has been one of our core principles since Power was founded, Facebook historically has been criticized for not respecting its users’ rights to ownership of their own content – and that is the crux of the dispute. Facebook is attempting to prevent Power from providing tools to Internet users that allow those users to exercise ownership and control over their own data.

Facebook is also attempting to stifle the development of Power's innovative new technologies that will liberate Internet users from proprietary restrictions that prevent them from controlling access to their own data.

**A. Facebook's Allegation That Power.com Has Made "Unauthorized" Use Of Users' Login Passwords Is False And Frivolous**

One example of Facebook improperly restricting their users' ownership and control of their own data is Facebook's purported "security measure" of prohibiting users from providing their own username and password to third parties, such as Power. This purported "security measure" is discussed at paragraph 3 of Facebook's complaint. But this is not a "security measure" at all. The entry of usernames and passwords to access a website through a third-party site poses no threat to security. On the contrary, it is commonplace in the industry. Indeed, it is a practice that Facebook itself employs on its own site to allow its users to access other websites through Facebook. For example, below is a screen capture from <http://www.facebook.com/gettingstarted.php?>

Step 1	Step 2	Step 3
Find Friends	Profile Information	Join a Network
<p><b>Find friends using your email account</b></p> <p>Searching your email account is the fastest and most effective way to find your friends on Facebook.</p> <p>Your Email: <input type="text" value="email@gmail.com"/></p> <p>Password: <input type="password"/></p> <p><input type="button" value="Find Friends"/></p> <p>We won't store your password or contact anyone without your permission.</p> <p><a href="#">Find people you Instant Message</a></p> <p><a href="#">Skip this step</a></p>		

1           On this page, Facebook solicits users to enter their account names and passwords for users'  
2 email accounts at Google's Gmail, AOL, Yahoo, Hotmail, or other third party websites. Facebook  
3 then uses the account information to allow the user to access those accounts through Facebook, and  
4 to import information – *i.e.*, to “scrape” data – from those third-party sites into Facebook. This  
5 practice fueled Facebook's growth by allowing Facebook to add millions of new users, and to  
6 provide users with convenient tools to encourage their friends and contacts to join Facebook as  
7 well.

8           Facebook seeks to stifle competitors from using the same type of utility. Facebook's  
9 purported “security measure” – prohibiting Facebook users from logging into Facebook through  
10 third-party sites, such as Power.com – unduly restricts users' ability to access their own data. It  
11 thwarts the development of innovative technologies, platforms, and applications that users might  
12 wish to use, such as those offered by Power.com.

13           In this lawsuit Facebook alleges that Power has made “unauthorized” use of Facebook  
14 users' login credentials (usernames and passwords). *See* Complaint ¶ 50 (“In order for a visitor to  
15 integrate a Facebook account into Power.com's website, Power.com requires that users provide it  
16 with their Facebook username and password.”). Power permits users to enter their account  
17 information to access the Facebook site through Power.com, just as Facebook does with respect to  
18 other sites. This is a common industry practice. Is not “unauthorized.” It is clearly authorized by  
19 the user who enters his own account information. Facebook's complaint does not identify a single  
20 instance of “unauthorized” use of a username or password. Nor does Facebook's complaint  
21 identify a single instance in which anyone's account security was compromised by Power in any  
22 way. As we point out above, users' right to security of their data is one of the three fundamental  
23 principles underlying Power's Internet User Bill of Rights. Power has taken every appropriate  
24 measure to protect that security.

**B. Facebook's Allegation That Power.com Has Sent Unsolicited Commercial Messages To Facebook's Users Is False; In Fact, Facebook Itself Sent The "Unsolicited Message" Referenced In The Complaint**

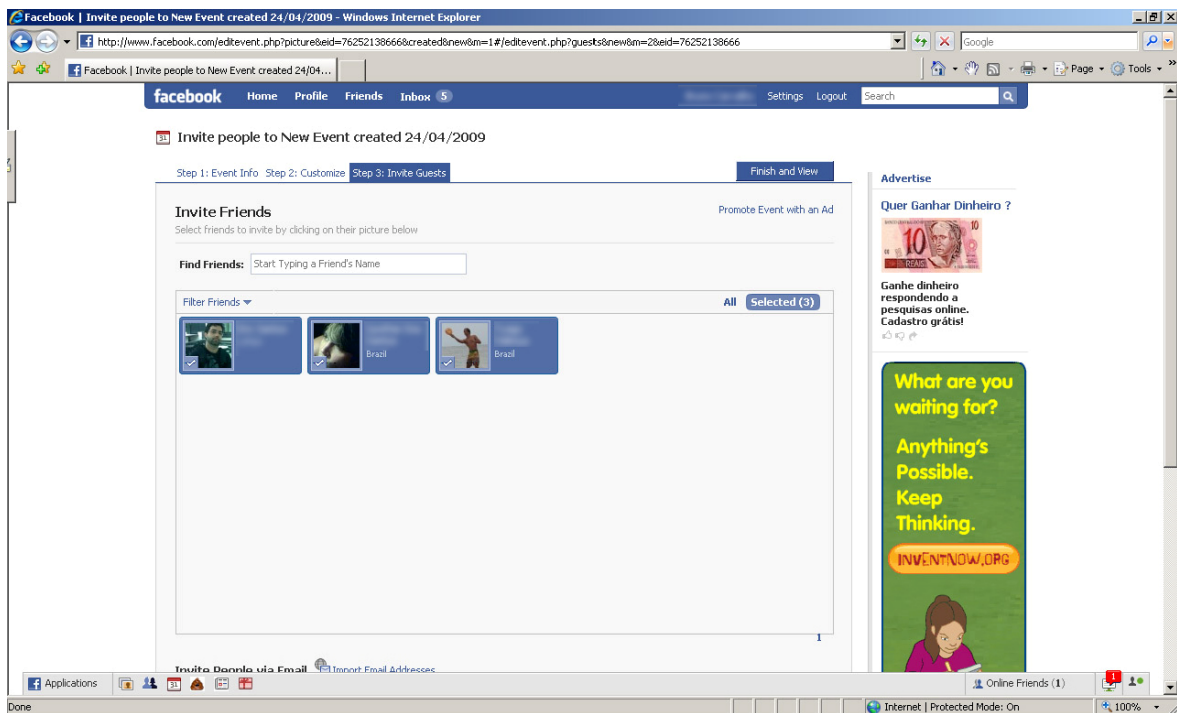
Facebook's complaint alleges that Power sent "unsolicited" email messages to Facebook users which were "deceptive and misleading." *See* Complaint ¶¶ 65-73. That allegation is false. Power did not send the email message referenced in the complaint. Facebook did.

Facebook allows users to create "events," which Facebook then invites friends to attend. The screen captures from www.facebook.com below illustrates the event creation process.

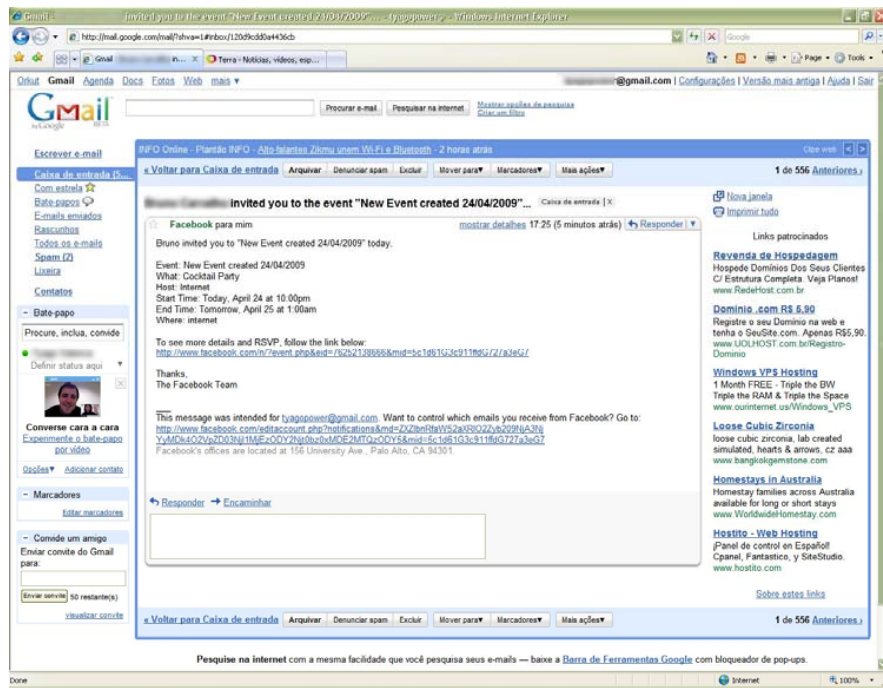
The screenshot displays the Facebook 'Create an Event' interface. The browser window title is 'Facebook | Create an Event - Windows Internet Explorer'. The address bar shows 'http://www.facebook.com/home.php?ref=home#/editevent.php'. The Facebook navigation bar includes links for Home, Profile, Friends, Inbox (5), Settings, and Logout. The main content area is titled 'Create an Event' with a sub-tab 'Step 1: Event Info'. The form fields are as follows:

- Event Name (required): New Event created 24/04/2009
- Tagline:
- Host (required): Internet
- Event Type (required): Party (selected), Cocktail Party (dropdown option)
- Description:
- Start Time: April 24 at 10:00 pm
- End Time: April 25 at 1:00 am
- Location (required):
- Street:
- City/Town:
- Phone:
- Email:

At the bottom of the form are 'Create Event' and 'Cancel' buttons. On the right sidebar, there is an advertisement for 'Moeda Transação Online' and 'easy forex' with the text 'Uma pequena mudança na taxa do dólar pode ser uma grande oportunidade para s Aproveite já a oportunidade Forex.' Below that is another ad with the text 'What are you waiting for? Anything's Possible. Keep Thinking. INVENTNOW,OP'.



After the user has created the event and selected the friends to be invited, Facebook then sends the invitations by email:



AMENDED ANSWER AND COUNTERCLAIMS OF DEFENDANTS POWER VENTURES, INC.  
AND STEVE VACHANI

1 This email is sent by Facebook. Facebook determines the address that appears in the “From:” field  
2 *See* Complaint ¶ 68 (“From: Facebook<eventmaster+zOs9a6jc@facebookmail.com>”). Facebook  
3 also adds the closing signature from “The Facebook Team.” *See* Complaint ¶ 69 (“The message ...  
4 is signed by “The Facebook Team,” which is both misleading and false.”). Neither the user nor  
5 Power has any control over these elements of the email message. All content in these email  
6 messages that Facebook alleges to be misleading and false was written and appended to the  
7 message by Facebook itself.

8 Notably, Facebook’s complaint is devoid of any allegation that any user was actually  
9 misled by any of these messages. Facebook’s pleading is also devoid of any allegation that any  
10 user, or any recipient of such messages, has complained about the contact or about the message  
11 being unsolicited. Facebook’s allegations concerning these “unsolicited” emails are trumped-up  
12 and frivolous. As Facebook well knows, Facebook itself was the source of these messages. And  
13 Facebook was the source of every element that Facebook contends is false or misleading. Every  
14 email referenced in Complaint ¶¶ 65-73 was generated and transmitted by Facebook as a result of a  
15 conscious action taken by users.

16  
17 **C. Facebook’s Allegations That Power.com Has Violated  
Facebook’s Intellectual Property Rights Are Frivolous**

18 Power.com believes strongly in intellectual property rights, including the right of users to  
19 own and to control their own data. That is the intellectual property of the user. Facebook does not  
20 own that intellectual property. The users do.

21 Facebook’s complaint broadly alleges that Power.com has violated Facebook’s rights by  
22 copying the Facebook website. But the complaint does not identify either the copyrighted work or  
23 the allegedly infringing work. It refers generically to ‘Facebook’s website,’ but does not identify  
24 any portion of the website, any graphics or text, or any computer program that is alleged to have  
25 been copied ‘and/or’ the source for a derivative work. *See* Complaint ¶ 125. The complaint also  
26 refers generically to “copies and/or derivative works created by Defendants,” *id.* ¶ 127, but it does  
27 not identify the “copies and/or derivative works” in any intelligible way. This is probably the most  
28 vague allegation of copyright infringement that has ever been filed.



1           The Facebook website is massive. It includes many different elements – some of which are  
2 subject to copyrights owned by Facebook and some of which clearly are not. The bulk of the  
3 Facebook site is comprised of “User Content.” This “User Content” includes “photos, profiles,  
4 messages, notes, text, information, music, video, advertisements, listings, and other content that  
5 [users] upload, publish or display” on the Facebook site. *See* Facebook Terms of Use (rev. Sept.  
6 23, 2008), available at <http://www.facebook.com/terms.php>. Facebook owns no copyright to such  
7 User Content. Indeed, Facebook’s own Terms of Use expressly state that “Facebook does not  
8 assert any ownership over your User Content.” *Id.* The Facebook site also contains “articles,  
9 photographs, text, graphics, pictures, designs, music, sound, video, information applications,  
10 software and other content or items belonging to or originating from third parties.” *Id.* (section  
11 headed “Third Party Websites and Content”). Facebook does not own the copyrights to these third  
12 party materials.

13           Power.com provides users with utilities that allow them to copy their own User Content for  
14 purposes of updating it and making it portable to other sites – without copying other elements of  
15 the Facebook website. The Complaint does not allege that Power.com has copied any element of  
16 the Facebook site that is subject to a copyright owned by Facebook.

17           The applicable copyright statute, 17 U.S.C. § 512, requires a notification of copyright  
18 infringement to include “[i]dentification of the copyrighted work claimed to have been infringed,  
19 or, if multiple copyrighted works at a single online site are covered by a single notification, a  
20 representative list of such works at that site.” 17 U.S.C. § 512(c)(3)(A)(ii). It also requires  
21 “[i]dentification of the material that is claimed to be infringing or the subject of infringing  
22 activity.” *Id.* § 512(c)(3)(A)(iii). Indeed, even Facebook’s own DMCA Notice of Copyright  
23 Infringement, which it uses to address reports of potential copyright infringement on its own site,  
24 *requires* this information. *See* Facebook DMCA Notice of Copyright Infringement, available at  
25 [http://www.facebook.com/copyright.php?copyright\\_notice=1](http://www.facebook.com/copyright.php?copyright_notice=1) (“Identify the copyrighted work that  
26 you claim has been infringed. ... Identify the content on our site that you claim infringes your  
27 copyright. ... Where does the infringing content appear on our site? In almost all instances the  
28



1 best way to help us locate the content you are reporting is to provide us with the URL.”).

2 Facebook’s complaint does not include even the most basic information that it requires from its  
3 own users in order to report copyright infringement.

4 Unable to identify any actual infringement of a copyright-protected element of its website,  
5 Facebook has resorted to arguing that Power “created cached copies of the [Facebook] website.”  
6 *See* Facebook’s 4/17/09 Opposition to Power’s Motion to Dismiss at 9:13-15. What that means is  
7 that Facebook alleges that every time the Facebook website is displayed on a computer it is  
8 “copied,” albeit momentarily, in the computer’s cached memory. This allegation of copying is  
9 akin to charging the Dell company with copyright infringement whenever a user accesses the  
10 Facebook website through a Dell computer; or charging the Lexmark company with copyright  
11 infringement every time a user prints a page from the Facebook website on a Lexmark printer.  
12 Furthermore, even if Facebook could premise a copyright claim on the ephemeral and momentary  
13 copying of a website in a computer’s cached memory, such temporary and intermediate copying in  
14 order to extract non-copyrighted elements – such as the User Content at issue here – falls squarely  
15 within the fair use doctrine.

## 16 **II. GENERAL DENIAL**

17 Pursuant to Fed. R. Civ. P. 8(b)(3), Defendants generally deny all allegations in the  
18 complaint except those specifically admitted herein.

## 19 **III. SPECIFIC DENIALS**

- 20 1. Defendants deny the allegations in paragraph 1.
- 21 2. Defendants deny knowledge or information sufficient to form a belief as to the truth  
22 of the allegations in ¶ 2, except that Defendants admit that Facebook operates a social networking  
23 site.
- 24 3. Defendants deny knowledge or information sufficient to form a belief as to the truth  
25 of the allegations in ¶ 3, except that Defendants deny that Facebook’s attempt to prohibit users  
26 from sharing their login information is a “security measure.” Facebook solicits login information  
27

1 for third-party sites. This is a common industry practice. Facebook's attempt to prohibit others  
2 from doing the same is an illegal and anticompetitive practice.

3 4. Defendants deny knowledge or information sufficient to form a belief as to the truth  
4 of the allegations in ¶ 4.

5 5. Defendants deny the allegations in ¶ 5, except that Defendants admit that they  
6 operate a website, [www.power.com](http://www.power.com), which offers to integrate multiple social networking accounts  
7 into a single experience on Power.com.

8 6. Defendants deny the allegations in ¶ 6.

9 7. Defendants deny the allegations in ¶ 7.

10 8. Defendants deny knowledge sufficient to form a belief as to the truth of the  
11 allegations in ¶ 8.

12 9. Defendants deny the allegations in ¶ 9.

13 10. Defendants deny the allegations in ¶ 10, except that Defendants admit that Power  
14 Ventures, Inc. is a corporation incorporated in the Cayman Islands, doing business in the State of  
15 California.

16 11. Defendants deny the allegations in ¶ 11, except that Defendants admit that Vachani  
17 is CEO of Power.com.

18 12. Defendants deny knowledge sufficient to form a belief as to the truth of the  
19 allegations in ¶ 12.

20 13. Defendants deny knowledge sufficient to form a belief as to the truth of the  
21 allegations in ¶ 13.

22 14. No response needed.

23 15. The allegations of ¶ 15 state conclusions of law to which no response is required.

24 16. The allegations of ¶ 16 state conclusions of law to which no response is required.

25 17. The allegations of ¶ 17 state conclusions of law to which no response is required.  
26  
27  
28

1           18. Defendants deny the allegations in ¶ 18, except that Defendants admit that Power  
2 permits users to enter their account information to access the Facebook site through Power.com,  
3 just as Facebook does with respect to other sites. This is a practice common in the industry.

4           19. Defendants deny knowledge sufficient to form a belief as to the truth of the  
5 allegations in ¶ 19.

6           20. Defendants admit the allegations in ¶ 20.

7           21. Defendants deny knowledge sufficient to form a belief as to the truth of the  
8 allegations in ¶ 21, except that Defendants admit that Facebook users register with a unique user  
9 name and password.

10          22. Defendants admit the allegations in ¶ 22.

11          23. Defendants admit the allegations in ¶ 23.

12          24. Defendants admit the allegations in ¶ 24.

13          25. Defendants admit the allegations in ¶ 25.

14          26. Defendants deny knowledge sufficient to form a belief as to the truth of the  
15 allegations in ¶ 26.

16          27. Defendants deny the allegations in ¶ 27.

17          28. Defendants deny the allegations in ¶ 28, except that Defendants admit that Facebook  
18 permits limited integration with third party websites through Facebook Connect.

19          29. Defendants admit the allegations in ¶ 29, except that Defendants deny that the  
20 Terms of Use attached as Exhibit A are current. Defendants also deny that certain of the terms of  
21 use are legally enforceable.

22          30. Defendants admit that the allegations in ¶ 30, except that Defendants deny that  
23 certain of the terms of use are legally enforceable.

24          31. The allegations of ¶ 31 state conclusions of law to which no response is required.

25          32. Defendants deny the allegations in ¶ 32.

26          33. Defendants deny the allegations in ¶ 33.

1           34. Defendants deny knowledge sufficient to form a belief as to the truth of the  
2 allegations in ¶ 34.

3           35. Defendants deny the allegations in ¶ 35.

4           36. Defendants deny the allegations in ¶ 36.

5           37. Defendants deny knowledge sufficient to form a belief as to the truth of the  
6 allegations in ¶ 37.

7           38. Defendants deny knowledge sufficient to form a belief as to the truth of the  
8 allegations in ¶ 38.

9           39. Defendants deny knowledge sufficient to form a belief as to the truth of the  
10 allegations in ¶ 39.

11           40. Defendants deny knowledge sufficient to form a belief as to the truth of the  
12 allegations in ¶ 40.

13           41. Defendants deny knowledge sufficient to form a belief as to the truth of the  
14 allegations in ¶ 41.

15           42. Defendants deny knowledge sufficient to form a belief as to the truth of the  
16 allegations in ¶ 42.

17           43. Defendants admit the allegations in ¶ 43.

18           44. Defendants deny knowledge sufficient to form a belief as to the truth of the  
19 allegations in ¶ 44.

20           45. Defendants deny the allegations in ¶ 45, except that Defendants admit that Power  
21 permits users to enter their account information to access the Facebook site through Power.com,  
22 just as Facebook does with respect to other sites. This is a practice common in the industry.

23           46. Defendants deny the allegations in ¶ 46, except that Defendants admit that Vachani  
24 and other Power employees have registered for personal Facebook accounts.

25           47. Defendants deny the allegations in ¶ 47.

26           48. Defendants deny the allegations in ¶ 48.

27           49. Defendants admit the allegations in ¶ 49.

1           50. Defendants deny the allegations in ¶ 50, except that Defendants admit that Power  
2 permits users to enter their account information to access the Facebook site through Power.com,  
3 just as Facebook does with respect to other sites. This is a practice common in the industry.

4           51. Defendants deny the allegations in ¶ 51.

5           52. Defendants deny the allegations in ¶ 52.

6           53. Defendants admit the allegations in ¶ 53.

7           54. Defendants deny the allegations in ¶ 54.

8           55. Defendants deny the allegations in ¶ 55.

9           56. Defendants deny the allegations in ¶ 56.

10          57. Defendants deny the allegations in ¶ 57, except that Defendants admit that Facebook  
11 has communicated such claims to Mr. Vachani.

12          58. Defendants deny the allegations in ¶ 58, except that Defendants admit that Vachani  
13 offered to attempt to integrate Power.com with Facebook Connect.

14          59. Defendants deny knowledge sufficient to form a belief as to the truth of the  
15 allegations in ¶ 59.

16          60. Defendants deny the allegations in ¶ 59, except that Defendants admit that Vachani  
17 communicated concerns about Power's ability to integrate Power.com with Facebook Connect on  
18 the schedule that Facebook was demanding.

19          61. Defendants deny the allegations in ¶ 61.

20          62. Defendants deny the allegations in ¶ 62.

21          63. Defendants deny the allegations in ¶ 63, except that Defendants admit that Facebook  
22 implemented technical measures to block users from accessing Facebook through Power.com.

23          64. Defendants deny the allegations in ¶ 64, except that Defendants admit that Power  
24 provided users with tools necessary to access Facebook through Power.com.

25          65. Defendants admit the allegations in ¶ 65.

66. Defendants admit the allegations in ¶ 66, except that Defendants deny that Power.com sent unsolicited commercial emails, and Defendants deny that any of their conduct was “unauthorized.” All of Defendants conduct was fully authorized by the users.

67. Defendants deny the allegations in ¶ 67.

68. Defendants admit the allegations in ¶ 68. In fact, Facebook sent the referenced message, and it was Facebook that designated the message with an “@facebookmail.com” address.

69. Defendants deny the allegations in ¶ 69, except that Defendants admit that the email message purports to be “signed by ‘The Facebook Team.’” In fact, Facebook appended that signature to the message.

70. Defendants admit the allegations in ¶ 70, except that Defendants deny that the message was “unsolicited.”

71. Defendants deny the allegations in ¶ 71.

72. Defendants deny the allegations in ¶ 72, except that Defendants admit that Power.com’s offer of potential monetary compensation may have induced some Facebook users to participate in Power’s launch program.

73. Defendants deny the allegations in ¶ 73.

74. Defendants admit the allegations in ¶ 74. Facebook has also “developed computer software and other automated devices and programs to access and obtain information” from other websites, as detailed above, for example. This is a common industry practice.

75. Defendants deny the allegations in ¶ 75, except that Defendants admit that Power creates temporary cached copies of the Facebook website in order to display it through the Power browser. This is a standard practice used by all browsers. For example, the Microsoft company also creates “cached copies” every time a user views the Facebook site through the Internet Explorer browser. Similarly Google creates and stores “cached copies” of nearly every website on the internet, including Facebook.com. (Other search engines do the same.) Power does not store or retain these cached copies. Facebook has also accessed and copied third party websites

(including but not limited to, creation of cached copies of the website) to develop, test, implement, use and provide” Facebook’s services. This too is a common industry practice.

76. Defendants deny the allegations in ¶ 76.

77. Defendants deny the allegations in ¶ 77.

78. Defendants deny the allegations in ¶ 78.

79. Defendants deny the allegations in ¶ 79.

80. Defendants deny the allegations in ¶ 80.

81. Defendants deny the allegations in ¶ 81.

82. Defendants deny the allegations in ¶ 82.

83. Defendants deny the allegations in ¶ 83.

84. Defendants deny the allegations in ¶ 84.

85. Defendants deny the allegations in ¶ 85.

86. Defendants deny the allegations in ¶ 86.

#### **First Claim For Relief**

#### **Violation of Controlling The Assault of Non-Solicited Pornography And Marketing (“CAN-SPAM”), 15 U.S.C. § 7701, *et seq.***

87. Paragraph 87 simply refers back to the allegations of prior paragraphs. No further response is required.

88. Defendants deny knowledge sufficient to form a belief as to the truth of the allegations in ¶ 88.

89. The allegations of ¶ 89 state conclusions of law to which no response is required.

90. The allegations of ¶ 90 state conclusions of law to which no response is required.

91. Defendants deny the allegations in ¶ 91.

92. Defendants deny the allegations in ¶ 92.

93. Defendants deny the allegations in ¶ 93.

94. Defendants deny the allegations in ¶ 94.

95. Defendants deny the allegations in ¶ 95.

1 96. Defendants deny the allegations in ¶ 96.

2 97. Defendants deny the allegations in ¶ 97.

3 98. Defendants deny the allegations in ¶ 98.

4 99. Defendants deny the allegations in ¶ 99.

5 100. Defendants deny the allegations in ¶ 100.

6 101. Defendants deny the allegations in ¶ 101.

7 102. Defendants deny the allegations in ¶ 102.

8 **Second Claim For Relief**

9 **Violation of The Computer Fraud And Abuse Act, 18 U.S.C.  
10 § 1030, *et seq.***

11 103. Paragraph 103 simply refers back to the allegations of prior paragraphs. No further  
12 response is required.

13 104. The allegations of ¶ 104 state conclusions of law to which no response is required.

14 105. Defendants deny the allegations in ¶ 105.

15 106. Defendants deny the allegations in ¶ 106.

16 107. Defendants deny the allegations in ¶ 107.

17 108. Defendants deny the allegations in ¶ 108.

18 109. Defendants deny the allegations in ¶ 109.

19 110. Defendants deny the allegations in ¶ 110.

20 111. Defendants deny the allegations in ¶ 111.

21 **Third Claim For Relief**

22 **California Comprehensive Computer Data Access And Fraud  
Act, California Penal Code § 502**

23 112. Paragraph 112 simply refers back to the allegations of prior paragraphs. No further  
24 response is required.

25 113. Defendants deny the allegations in ¶ 113.

26 114. Defendants deny the allegations in ¶ 114.

27 115. Defendants deny the allegations in ¶ 115.

28 116. Defendants deny the allegations in ¶ 116.



1 117. Defendants deny the allegations in ¶ 117.

2 118. Defendants deny the allegations in ¶ 118.

3 119. Defendants deny the allegations in ¶ 119.

4 120. Defendants deny the allegations in ¶ 120.

5 121. Defendants deny the allegations in ¶ 121.

6 **Fourth Claim For Relief**

7 **Copyright Infringement (Direct Vicarious And Contributory)**

8 **17 U.S.C. § 101, *et seq.***

9 122. Paragraph 122 simply refers back to the allegations of prior paragraphs. No further  
10 response is required.

11 123. Defendants deny knowledge sufficient to form a belief as to the truth of the  
12 allegations in ¶ 123.

13 124. Defendants admit the allegations in ¶ 124.

14 125. Defendants deny the allegations in ¶ 125.

15 126. Defendants deny the allegations in ¶ 126.

16 127. Defendants deny the allegations in ¶ 127.

17 128. Defendants deny the allegations in ¶ 128.

18 129. Defendants deny the allegations in ¶ 129.

19 130. Defendants deny the allegations in ¶ 130.

20 131. Defendants deny the allegations in ¶ 131.

21 132. Defendants deny the allegations in ¶ 132.

22 133. Defendants deny the allegations in ¶ 133.

23 **Fifth Claim For Relief**

24 **Violation Of The Digital Millennium Copyright Act (“DMCA”),**

25 **17 U.S.C. § 1201, *et seq.***

26 134. Paragraph 134 simply refers back to the allegations of prior paragraphs. No further  
27 response is required.

28 135. Defendants deny knowledge sufficient to form a belief as to the truth of the  
allegations in ¶ 135.

136. Defendants deny knowledge sufficient to form a belief as to the truth of the allegations in ¶ 136.

137. Defendants deny the allegations in ¶ 137.

138. Defendants deny the allegations in ¶ 138.

139. Defendants deny the allegations in ¶ 139.

140. Defendants deny the allegations in ¶ 140.

141. Defendants deny the allegations in ¶ 141.

142. Defendants deny the allegations in ¶ 142.

143. Defendants deny the allegations in ¶ 143.

144. Defendants deny the allegations in ¶ 144.

### **Sixth Claim For Relief**

**Trademark Infringement, 15 U.S.C. §§ 1114 and 1125(a)**

145. Paragraph 145 simply refers back to the allegations of prior paragraphs. No further response is required.

146. Defendants deny knowledge sufficient to form a belief as to the truth of the allegations in ¶ 146.

147. Defendants deny the allegations in ¶ 147.

148. Defendants deny the allegations in ¶ 148.

149. Defendants deny the allegations in ¶ 149.

150. Defendants deny the allegations in ¶ 150.

151. Defendants deny the allegations in ¶ 151.

152. Defendants deny the allegations in ¶ 152.

153. Defendants deny the allegations in ¶ 153.

### **Seventh Claim For Relief**

## Trademark Infringement Under California Law

154. Paragraph 154 simply refers back to the allegations of prior paragraphs. No further response is required.

155. Defendants deny knowledge sufficient to form a belief as to the truth of the allegations in ¶ 155.

156. Defendants deny the allegations in ¶ 156.

**Eighth Claim For Relief**

**Unlawful, Unfair, And Fraudulent Competition Under California Business & Professions Code § 17,200, *et seq.***

157. Paragraph 157 simply refers back to the allegations of prior paragraphs. No further response is required.

158. Defendants deny the allegations in ¶ 158.

159. Defendants deny the allegations in ¶ 159.

**IV. AFFIRMATIVE DEFENSES**

**First Affirmative Defense**

**Fair Use, 17 U.S.C. § 107**

161. Power.com provides users with utilities that allow them to copy their own User Content for purposes of updating it and making it portable to other sites – without copying other elements of the Facebook website.

162. The only allegation of copying by Facebook is the allegation that third parties – Internet users – utilizing Power’s utilities have “created cached copies of the [Facebook] website.” *See* Facebook’s 4/17/09 Opposition to Power’s Motion to Dismiss at 9:13-15. What that means is that Facebook alleges that every time the Facebook website is displayed on a computer it is “copied,” albeit momentarily, in the computer’s cached memory. That allegation of copying is akin to charging the Dell company with copyright infringement whenever a user accesses the Facebook website through a Dell computer; or charging the Lexmark company with copyright infringement every time a user prints a page from the Facebook website on a Lexmark printer. The Microsoft company also creates “cached copies” of the Facebook website every time a user views the Facebook site through the Internet Explorer browser. Similarly Google creates and stores “cached copies” of nearly every website on the internet, including Facebook.com. (Other search engines do the same.)

163. Even if Facebook could premise a copyright claim on the ephemeral and momentary copying of a website in a computer's cached memory, such temporary and intermediate copying in order to extract non-copyrighted elements – such as the User Content at issue here – falls squarely within the fair use doctrine.

164. The “copying,” if any, constituted fair use under 17 U.S.C. § 107, and thus is not copyright infringement. *See, e.g., Sega v. Accolade*, 977 F.2d 1510, 1514 (9<sup>th</sup> Cir. 1992) (holding intermediate copying of copyrighted computer work to gain understanding of unprotected functional elements was fair use); *Sony v. Connectix*, 203 F.3d 596, 608 (9<sup>th</sup> Cir. 2000) (holding intermediate copying of BIOS that was necessary to access unprotected functional elements constituted fair use).

## Second Affirmative Defense

## Copyright Misuse

165. Copyright misuse is a defense to copyright infringement. The copyright misuse doctrine “forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant.” *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir.2005). “The misuse defense prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.” [\*A & M Records v. Napster, Inc.\*, 239 F.3d 1004, 1026 \(9th Cir.2001\)](#).

166. The Facebook website is massive. It includes many different elements – some of which are subject to copyrights owned by Facebook and some of which clearly are not. The bulk of the Facebook site is comprised of “User Content.” This “User Content” includes “photos, profiles, messages, notes, text, information, music, video, advertisements, listings, and other content that [users] upload, publish or display” on the Facebook site. *See* Facebook Terms of Use (rev. Sept. 23, 2008), available at <http://www.facebook.com/terms.php>. Facebook owns no copyright to such User Content. Indeed, Facebook’s own Terms of Use expressly state that “Facebook does not assert any ownership over your User Content.” *Id.* The Facebook site also contains “articles, photographs, text, graphics, pictures, designs, music, sound, video, information

1 applications, software and other content or items belonging to or originating from third parties.”  
 2 *Id.* (section headed “Third Party Websites and Content”). Facebook does not own the copyrights to  
 3 these third party materials.

4 167. Power.com provides users with utilities that allow them to copy their own User  
 5 Content for purposes of updating it and making it portable to other sites – without copying other  
 6 elements of the Facebook website. The Complaint does not allege that Power.com has copied any  
 7 element of the Facebook site that is subject to a copyright owned by Facebook.

8 168. Facebook has committed copyright misuse by attempting to use its copyright in the  
 9 Facebook website control areas outside of their copyright monopoly, such as by restricting users’  
 10 ability to access their own User Content, which is not within the limited monopoly granted by  
 11 Facebook’s copyright to the Facebook website.

### 12 **Third Affirmative Defense**

#### 13 **Additional Defenses**

14 166. Defendants reserve the right to allege additional defenses as they become known  
 15 during discovery and to amend this Answer accordingly.

## 16 **V. COUNTERCLAIMS**

### 17 **First Counterclaim**

#### 18 **Unfair Competition In Violation Of** 19 **California Business & Professions Code §§ 17200 *Et Seq.*** **(Unfair Business Practices)**

20 167. Defendants incorporate by reference all allegations of all prior paragraphs as though  
 21 fully set forth herein.

22 168. Facebook is subject to the Unfair Competition Law, Sections 17200 *et seq.* of the  
 23 California Business & Professions Code (the “UCL”). The UCL provides, in pertinent part:  
 24 “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and  
 25 unfair, deceptive, untrue or misleading advertising...”

26 169. Facebook violated the unfair business practices prong of the UCL (i) by committing  
 27 copyright misuse systematically and on a massive scale as described in ¶¶ 165-168, (ii) by  
 28 soliciting internet users to provide their account names and passwords for users’ email and social

networking accounts, such as Google's Gmail, AOL, Yahoo, Hotmail, or other third party websites, and running automated scripts on those third-party websites while simultaneously prohibiting users from utilizing the same type of utilities to access their own user data when it is stored on the Facebook site, and (iii) by engaging in a campaign of threats and intimidation against competitors, including by threatening dozens of new entrants since 2006 with baseless intellectual property claims to discourage market entry and to stifle competition from new entrants.

**Second Counterclaim**  
**Monopolization, 15 U.S.C. § 2**

170. Defendants incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

171. Facebook possesses market power in the market for social networking websites.

172. The relevant market for social networking websites includes websites that allow users to create personal profiles, manage contacts, and provide a variety of ways for users to interact with contacts. The relevant geographic market is the United States. As of September 2009, the market share of the five largest social networking websites in the United States, ranked by market share of U.S. visits, as reported by Experian Hitwise, was as follows:

Rank	Name	Domain	Market Share
1	Facebook	<a href="http://www.facebook.com">www.facebook.com</a>	58.59%
2	MySpace	<a href="http://www.myspace.com">www.myspace.com</a>	30.26%
3	Tagged	<a href="http://www.tagged.com">www.tagged.com</a>	2.38%
4	Twitter	<a href="http://www.twitter.com">www.twitter.com</a>	1.84%
5	myYearbook	<a href="http://www.myYearbook.com">www.myYearbook.com</a>	1.05%

See <http://www.hitwise.com/us/press-center/press-releases/social-networking-sept-09/>. In addition to holding a dominant share of the U.S. market, "Facebook ... is well on its way to establishing dominance in several parts of the world." See Alex Salkever, "Facebook, aiming for global domination, is gaining quickly in Asia," Daily Finance (Nov. 16, 2009), available at

1 [http://www.dailyfinance.com/2009/11/16/facebook-aiming-for-global-domination-is-gaining-](http://www.dailyfinance.com/2009/11/16/facebook-aiming-for-global-domination-is-gaining-quickly-in-as/print/)  
2 [quickly-in-as/print/](http://www.dailyfinance.com/2009/11/16/facebook-aiming-for-global-domination-is-gaining-quickly-in-as/print/).

3 173. Power.com is a competitor in the market for social networking websites.

4 174. Facebook has acquired and maintained market power through two devices:

5 (1) Facebook solicited (and continues to solicit) internet users to provide their  
6 account names and passwords for users' email and social networking accounts, such as Google's  
7 Gmail, AOL, Yahoo, Hotmail, or other third party websites. Facebook then uses the account  
8 information to allow the user to access those accounts through Facebook, and to run automated  
9 scripts to import their lists of friends and other contacts – *i.e.*, to “scrape” data – from those third-  
10 party sites into Facebook. This practice fueled Facebook's growth by allowing Facebook to add  
11 millions of new users, and to provide users with convenient tools to encourage their friends and  
12 contacts to join Facebook as well. On information and belief it is estimated that at least  
13 approximately 35% to 50% of Facebook's “132 million active users” (Facebook Amended  
14 Complaint, ¶ 2, Docket Entry No. 9), registered with Facebook as a result of an invitation  
15 generated using this device.

16 (2) Facebook simultaneously prohibited (and prohibits) users from using the  
17 same type of utility to access their own user data when it is stored on the Facebook site. Thus,  
18 Facebook prohibits users from logging into Facebook through third-party sites, such as Power.com,  
19 and also restricts users from running automated scripts to retrieve their own user data from the  
20 Facebook site.

21 175. Device (1) is commonplace in the industry. Many social networking web sites, and  
22 other types of websites, permit users to access their accounts through third-party websites. For  
23 example, as noted above, Google's Gmail, AOL, Yahoo, Hotmail, MySpace, and many other  
24 websites allow for such access. Device (2) is unique to Facebook. Defendant is aware of no  
25 comparable website that at the same time solicits access to user accounts on third-party sites while  
26 attempting to prohibit such access to user data stored on its own site.

1 176. Facebook has also maintained its monopoly power by systematically threatening  
2 new entrants, such as Power.com and others, who seek to attract users through the same device  
3 (Device (1) described in ¶ 174, above) that Facebook itself used to fuel its own growth. On  
4 information and belief, for approximately the past 36 months, Facebook has threatened dozens of  
5 new entrants since 2006 with baseless intellectual property claims, and has engaged in systematic  
6 and widespread copyright misuse as described in ¶¶ 165-168, above, to discourage market entry  
7 and to stifle competition from new entrants.

8 177. Facebook's efforts in this regard have been highly successful. Since Facebook  
9 embarked on this campaign of intimidation, no new entrant has amassed a market share of more  
10 than 2.38%. The only competitor with more than a 2.38% market share is MySpace, which was an  
11 established market leader for years before Facebook rose to dominance. Through the predatory  
12 conduct described herein, Facebook has reduced MySpace's market share by more than half in the  
13 past year, and has prevented any other entrant from garnering more than 2.38% of the market.

14 178. Facebook's conduct constitutes monopolization of the market for social networking  
15 website services in violation of Section 2 of the Sherman Act.

16 **Third Counterclaim**

17 **Attempted Monopolization, 15 U.S.C. § 2**

18 179. Defendants incorporate by reference all allegations of all prior paragraphs as though  
19 fully set forth herein.

20 180. The relevant market for social networking websites includes websites that allow  
21 users to create personal profiles, manage contacts, and provide a variety of ways for users to  
22 interact with contacts. The relevant geographic market is the United States. As of September  
23 2009, the market share of the five largest social networking websites in the United States, ranked  
24 by market share of U.S. visits, as reported by Experian Hitwise, was as follows:



Rank	Name	Domain	Market Share
1	Facebook	<a href="http://www.facebook.com">www.facebook.com</a>	58.59%
2	MySpace	<a href="http://www.myspace.com">www.myspace.com</a>	30.26%
3	Tagged	<a href="http://www.tagged.com">www.tagged.com</a>	2.38%
4	Twitter	<a href="http://www.twitter.com">www.twitter.com</a>	1.84%
5	myYearbook	<a href="http://www.myYearbook.com">www.myYearbook.com</a>	1.05%

See <http://www.hitwise.com/us/press-center/press-releases/social-networking-sept-09/>. In addition to holding a dominant share of the U.S. market, “Facebook ... is well on its way to establishing dominance in several parts of the world.” See Alex Salkever, “Facebook, aiming for global domination, is gaining quickly in Asia,” Nov. 16, 2009 Daily Finance, available at <http://www.dailyfinance.com/2009/11/16/facebook-aiming-for-global-domination-is-gaining-quickly-in-as/print/>.

181. Power.com is a competitor in the market for social networking websites.

182. Facebook has engaged in predatory and anticompetitive conduct, as follows:

(1) Facebook solicited (and continues to solicit) internet users to provide their account names and passwords for users’ email and social networking accounts, such as Google’s Gmail, AOL, Yahoo, Hotmail, or other third party websites. Facebook then uses the account information to allow the user to access those accounts through Facebook, and to run automated scripts to import their lists of friends and other contacts – *i.e.*, to “scrape” data – from those third-party sites into Facebook. This practice fueled Facebook’s growth by allowing Facebook to add millions of new users, and to provide users with convenient tools to encourage their friends and contacts to join Facebook as well. On information and belief it is estimated that at least approximately 35% to 50% of Facebook’s “132 million active users” (Facebook Amended Complaint, ¶ 2, Docket Entry No. 9), registered with Facebook as a result of an invitation generated using this device.

(2) Facebook simultaneously prohibited (and prohibits) users from using the same type of utility to access their own user data when it is stored on the Facebook site. Thus,

1 Facebook prohibits users from logging into Facebook through third-party sites, such as Power.com,  
2 and also restricts users from running automated scripts to retrieve their own user data from the  
3 Facebook site. Device (1) is commonplace in the industry. Many social networking web sites, and  
4 other types of websites, permit users to access their accounts through third-party websites. For  
5 example, as noted above, Google's Gmail, AOL, Yahoo, Hotmail, MySpace, and many other  
6 websites allow for such access. Device (2) is unique to Facebook. Defendant is aware of no  
7 comparable website that at the same time solicits access to user accounts on third-party sites while  
8 attempting to prohibit such access to user data stored on its own site.

9 (3) Facebook has threatened dozens of new entrants since 2006 with baseless  
10 intellectual property claims, and has engaged in systematic and widespread copyright misuse as  
11 described in ¶¶ 165-168, above, to discourage market entry and to stifle competition from new  
12 entrants.

13 183. Facebook engaged in the conduct described at ¶¶ 183(1)-(3) with a specific intent to  
14 monopolize the market for social networking websites.

15 184. Facebook has already achieved monopoly power, and/or there is a dangerous  
16 probability that Facebook will achieve monopoly power, if the conduct described in ¶ 183  
17 continues unabated. Within a single year, from September 2008 through September 2009,  
18 Facebook increased its market share nearly three-fold, from 19.94% to 58.59%, while no other  
19 entrant has been able to garner more than a 2.38% share.

20 185. Facebook's conduct constitutes an unlawful attempt to monopolize the market for  
21 social networking website services in violation of Section 2 of the Sherman Act.

## 22 VI. PRAYER FOR RELIEF

23 WHEREFORE, Defendants Power and Vachani pray for judgment as follows:

- 24 1. That plaintiffs take nothing by the Complaint, and that judgment be entered against  
25 Plaintiffs and in favor of Power and Vachani;
- 26 2. That Power and Vachani be awarded costs of suit incurred in defending this action,  
27 including reasonable attorneys' fees;

3. That Facebook be permanently enjoined from the unlawful and anticompetitive practices identified herein;

4. That Power and Vachani be awarded monetary damages for the injuries caused by Facebook's unlawful and anticompetitive practices;

5. That such damages be tripled under 15 U.S.C. § 15(a);

6. That Power and Vachani be awarded reasonable attorneys' fees, expenses and costs associated with prosecuting their claims; and

7. For such further relief as this Court deems necessary, just or proper.

## DEMAND FOR JURY TRIAL

Defendants demand a trial by jury.

Dated: November 23, 2009

Respectfully submitted,  
BRAMSON, PLUTZIK, MAHLER &  
BIRKHAUSER, LLP

By /s/  
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*Attorneys for Defendants Power  
 Ventures, Inc. and Steve Vachani*

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
 California corporation; POWER VENTURES, INC.  
 a Cayman Island Corporation, STEVE VACHANI,  
 an individual; DOE 1, d/b/a POWER.COM, an  
 individual and/or business entity of unknown nature;  
 DOES 2 through 25, inclusive, individuals and/or  
 business entities of unknown nature,

Defendants.

Case No. 5:08-CV-05780 JW

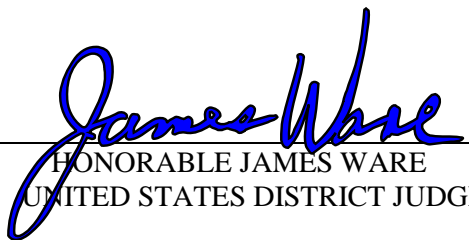
**[PROPOSED] ORDER  
 PERMITTING THE PUBLIC  
 FILING OF PORTIONS OF  
 FACEBOOK INC.'S  
 SUPPLEMENTAL BRIEF  
 REGARDING DAMAGES AND  
 LIABILITY OF DEFENDANT  
 STEVE VACHANI**

~~[PROPOSED]~~ ORDER PERMITTING THE PUBLIC FILING OF PORTIONS OF FACEBOOK INC.'S SUPPLEMENTAL  
 BRIEF REGARDING DAMAGES AND LIABILITY OF DEFENDANT STEVE VACHANI  
 CASE NO. 5:08-CV-05780 JW

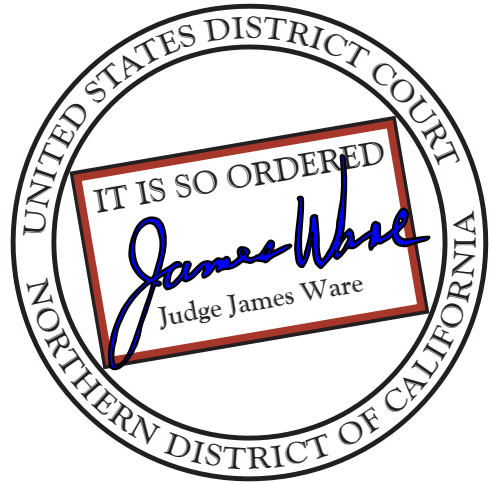
The Court, having considered the Declaration of L. Timothy Fisher Pursuant to Civil Rule 79-5(d) which removes the confidential designation of the documents referenced in Facebook Inc.'s Motion for Administrative Relief to File Under Seal (Dkt. No. 291), the Court hereby orders the documents referenced below to be filed publicly:

- Portions of Facebook's Supplemental Brief Regarding Damages and Liability of Steve Vachani that have not been previously designated by Facebook
- Portions of the January 9, 2012 Deposition of Defendant Power Ventures, Inc. ("Power") pursuant to Fed. R. Civ. P. 30(b)(6) attached as Exhibit 14 to the Declaration of Monte M.F. Cooper in Support of Facebook's Supplemental Brief Regarding Damages and Liability of Defendant Steve Vachani.
- Portions of the March 7, 2012 deposition of Defendant Power pursuant to F. R. Civ. P. 30(b)(6) attached as Exhibit 2 to the Declaration of Monte M.F. Cooper in Support of Facebook's Supplemental Brief Regarding Damages and Liability of Defendant Steve Vachani.
- Exhibit Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20, 24, 26, 27, 28, 29, 34, and 36 attached to the Declaration of Monte M.F. Cooper in Support of Facebook's Supplemental Brief Regarding Damages and Liability of Defendant Steve Vachani.

Dated: April 17, 2012

  
HONORABLE JAMES WARE  
UNITED STATES DISTRICT JUDGE

[PROPOSED] ORDER PERMITTING THE PUBLIC FILING OF PORTIONS OF FACEBOOK INC.'S SUPPLEMENTAL BRIEF REGARDING DAMAGES AND LIABILITY OF DEFENDANT STEVE VACHANI  
CASE NO. 5:08-CV-05780 JW



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Attorneys for Defendants Power  
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a  
California corporation; POWER VENTURES, INC.  
a Cayman Island Corporation, STEVE VACHANI,  
an individual; DOE 1, d/b/a POWER.COM, an  
individual and/or business entity of unknown nature;  
DOES 2 through 25, inclusive, individuals and/or  
business entities of unknown nature,

Defendants.

Case No. 5:08-CV-05780 JW (JCS)

~~[PROPOSED]~~ ORDER SEALING  
CERTAIN PORTIONS OF  
FACEBOOK, INC.'S MOTIONS  
FOR PARTIAL SUMMARY  
JUDGMENT AND FACEBOOK'S  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

~~[PROPOSED]~~ ORDER SEALING CERTAIN PORTIONS OF FACEBOOK, INC.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT  
AND FACEBOOK'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
CASE NO. 5:08-CV-05780 JW

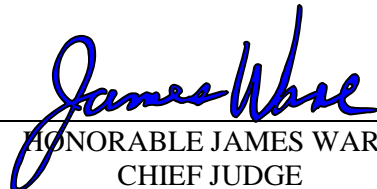
Defendants Power Ventures, Inc. and Steve Vachani seek to file under seal, pursuant to Civil L.R. 79-5(d), all or portions of the following documents: (1) Exhibits 2, 3, 4 and 9 to the Declaration of Monte M.F. Cooper in Support of Facebook, Inc.'s Motion for Partial Summary Judgment on Count 1 under the CAN-SPAM Act; (2) Exhibit 1 to the Declaration of Theresa Sutton in Support of Plaintiff Facebook, Inc.'s Opposition to Defendants' Motion for Summary Judgment; (3) the November 14, 2011 Declaration of Lawrence Melling in Support of Facebook, Inc.'s Motion for Partial Summary Judgment on Count 1 of the CAN-SPAM Act ; (4) the December 2, 2011 Declaration of Lawrence Melling in Support of Facebook, Inc.'s Opposition to Defendants' Motion for Summary Judgment; and (5) Exhibit 10 to the November 17, 2011 Declaration of Morvarid Metanat in Support of Facebook, Inc.'s Motion for Partial Summary Judgment Under Penal Code § 502 and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Having considered the papers filed in support of the motion, the Court HEREBY ORDERS that the motion is GRANTED and hereby seals the following documents:

- Pages 259-261 and 266-267 of the transcript of the deposition of Steve Vachani attached as Exhibit 2 to the Declaration of Monte M.F. Cooper in Support of Facebook, Inc.'s Motion for Partial Summary Judgment on Count 1 under the CAN-SPAM Act.
- Pages 259-261 and 266-267 of the transcript of the deposition of Steve Vachani attached as Exhibit 1 to the Declaration of Theresa Sutton in Support of Plaintiff Facebook, Inc.'s Opposition to Defendants' Motion for Summary Judgment.
- Exhibits 3, 4 and 9 to the Declaration of Monte M.F. Cooper in Support of Facebook, Inc.'s Motion for Partial Summary Judgment on Count 1 under the CAN-SPAM Act.
- The entire November 14, 2011 Declaration of Lawrence Melling in Support of Facebook, Inc.'s Motion for Partial Summary Judgment on Count 1 of the CAN-SPAM Act.
- The entire December 2, 2011 Declaration of Lawrence Melling in Support of Facebook, Inc.'s Opposition to Defendants' Motion for Summary Judgment.

- Exhibit 10 to the November 17, 2011 Declaration of Morvarid Metanat in Support of Facebook, Inc.'s Motion for Partial Summary Judgment Under Penal Code § 502 and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

IT IS SO ORDERED.

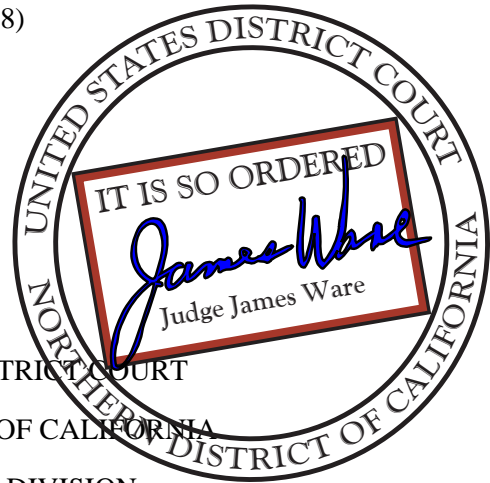
Dated: December 19, 2011

  
HONORABLE JAMES WARE  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT



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Attorneys for Plaintiff  
FACEBOOK, INC.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

FACEBOOK, INC.,

Plaintiffs,

v.

POWER VENTURES, INC. a Cayman Island  
Corporation,; STEVE VACHANI, an  
individual; DOE 1, d/b/a POWER.COM,  
DOES 2-25, inclusive,

Defendants.

Case No. 5:08-cv-05780 JW

~~PROPOSED~~ ORDER GRANTING  
FACEBOOK INC.'S MOTION FOR  
ADMINISTRATIVE RELIEF TO  
FILE UNDER SEAL PURSUANT TO  
CIVIL LOCAL RULE 79-5(B)

Dept: Courtroom 9, 19th Floor  
Judge: Hon. Chief Judge James Ware

~~PROPOSED~~ ORDER GRANTING FACEBOOK'S MOTION TO  
FILE UNDER SEAL  
5:08-cv-05780 JW

- (1) Portions of Exhibit 8, the Declaration of Joseph Cutler, attached to the Metanat Declaration shall be filed under seal.
- (2) Portions of Exhibit 9, the Declaration of Ryan McGeehan, attached to the Metanat Declaration shall be filed under seal.
- (3) The portions of Facebook’s Motion for Partial Summary Judgment under California Penal Code § 502 and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, referencing the portions of Exhibits 8 or 9 that have been designated as “HIGHLY-CONFIDENTIAL-ATTORNEY’ EYES ONLY.”

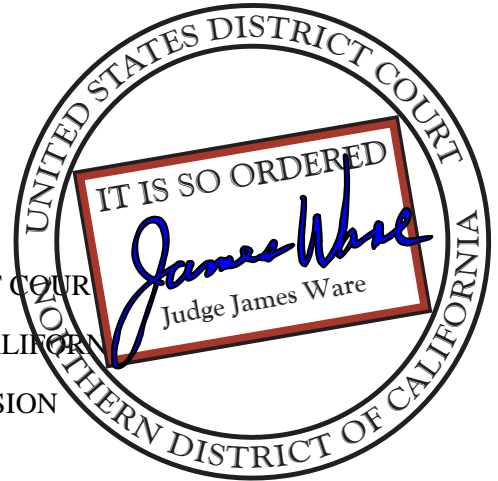
Dated: 11/28/11

~~PROPOSED~~ ORDER GRANTING FACEBOOK'S MOTION TO  
FILE UNDER SEAL  
5:08-CV-05780 JW

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Attorneys for Plaintiff  
FACEBOOK, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION



FACEBOOK, INC.,

Plaintiffs,

v.

POWER VENTURES, INC. a Cayman Island  
Corporation,; STEVE VACHANI, an  
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DOES 2-25, inclusive,

Defendants.

Case No. 5:08-cv-05780 JW

~~PROPOSED~~ ORDER GRANTING  
FACEBOOK INC.'S MOTION FOR  
ADMINISTRATIVE RELIEF TO  
FILE UNDER SEAL THE  
DECLARATIONS OF RYAN  
MCGEEHAN AND JOSEPH CUTLER  
AND PORTIONS OF FACEBOOK'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT PURSUANT TO CIVIL  
LOCAL RULE 79-5(B)

Dept: Courtroom 9, 19th Floor  
Judge: Hon. James Ware

~~PROPOSED~~ ORDER GRANTING FACEBOOK'S MOTION TO  
FILE UNDER SEAL  
5:08-cv-05780 JW

Facebook seeks to file under seal, pursuant to Civil Local Rule 79-5(b), the Declarations of Ryan McGeehan and Joseph Cutler in Support of Facebook's Motion for Partial Summary Judgment on Count 1, and portions of Facebook's Motion for Partial Summary Judgment incorporating or citing from said Declarations. Having considered the papers filed in support of and in opposition to the motion, and other matters relevant to the determination of this motion, the Court HEREBY ORDERS that the motion is GRANTED, as follows:

(1) The Declaration of Ryan McGeehan in Support of Facebook's Motion for Partial Summary Judgment on Count 1, and Exhibits 2, 3, and 4 shall be filed under seal.

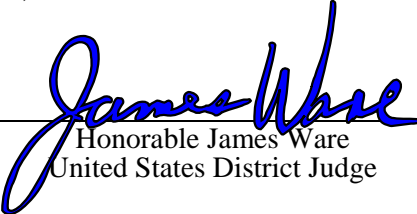
(2) Paragraphs 3-6, 10 and 12, as well as portions of Exhibit C, to the Declaration of Joseph Cutler in Support of Facebook's Motion for Partial Summary Judgment on Count 1, shall be filed under seal.

(3) The portions of Facebook's Motion for Partial Summary Judgment on Count 1 of the CAN-SPAM Act referencing the McGeehan and Cutler Declarations.

**IT IS SO ORDERED.**

Dated: 11/28/11

ORRICK, HERRINGTON & SUTCLIFFE LLP

  
Honorable James Ware  
United States District Judge

~~PROPOSED~~ ORDER GRANTING FACEBOOK'S MOTION TO  
FILE UNDER SEAL  
5:08-CV-05780 JW

\*E-FILED 02-04-2011\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC. a Cayman  
Island Corporation; STEVE VACHANI,  
an individual; DOE 1, d/b/a  
POWER.COM, DOES 2-25, inclusive,

Defendants.

Case No. 5:08-cv-05780 JW (HRL)

STIPULATED PROTECTIVE ORDER FOR  
STANDARD LITIGATION

**(MODIFIED BY THE COURT)**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 13.3, below, that this Stipulated Protective Order does not entitle them to file confidential

STIPULATED PROTECTIVE ORDER  
FOR STANDARD LITIGATION  
CASE No. 08-5780-JW (HRL)

1 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and  
2 the standards that will be applied when a party seeks permission from the court to file material  
3 under seal.

4 2. DEFINITIONS

5 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
6 information or items under this Order.

7 2.2 “CONFIDENTIAL” Information or Items: information, documents, and  
8 things the Designating Party believes in good faith is not generally known to others, and which  
9 the Designating party (i) would not normally reveal to third parties except in confidence or has  
10 undertaken with others to maintain in confidence, or (ii) believes in good faith is protected by a  
11 right to privacy under federal or state law or any other applicable privilege or right related to  
12 confidentiality or privacy.

13 2.3 “HIGHLY CONFIDENTIAL— ATTORNEYS’ EYES ONLY”  
14 Information or Items: information, documents and things the Designating Party believes in good  
15 faith is not generally known to others and has significant competitive value such that unrestricted  
16 disclosure to others would create a substantial risk of serious injury, and which the Designating  
17 Party (i) would not normally reveal to third parties except in confidence or has undertaken with  
18 others to maintain in confidence, or (ii) believes in good faith is significantly sensitive and  
19 protected by a right to privacy under federal or state law or any other applicable privilege or right  
20 related to confidentiality or privacy. The designation is reserved for information that constitutes  
21 proprietary financial or technical or commercially sensitive competitive information that the  
22 Producing Party maintains as highly confidential in its business, including information obtained  
23 from a nonparty pursuant to a current Nondisclosure Agreement (“NDA”), information relating to  
24 future products, strategic plans, non-public financial data, documents that would reveal trade  
25 secrets, licensing documents and licensing communications, and settlement agreements or  
26 settlement communications, the disclosure of which is likely to cause harm to the competitive  
27 position of the Producing Party.  
28

1                   2.4     “HIGHLY CONFIDENTIAL—SOURCE CODE” Information or Items:  
2     extremely sensitive “Confidential Information or Items” representing computer code and  
3     associated comments and revision histories, formulas, engineering specifications, or schematics  
4     that define or otherwise describe in detail the algorithms or structure of software or hardware  
5     designs, disclosure of which to another Party or Non-Party would create a substantial risk of  
6     serious harm that could not be avoided by less restrictive means.

7                   2.5     Counsel (without qualifier): Outside Counsel of Record and House  
8     Counsel (as well as their support staff).

9                   2.6     Designating Party: a Party or Non-Party that designates information or  
10    items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL,”  
11    “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY  
12    CONFIDENTIAL—SOURCE CODE.”

13                  2.7     Disclosure or Discovery Material: all items or information, regardless of  
14    the medium or manner in which it is generated, stored, or maintained (including, among other  
15    things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
16    or responses to discovery in this matter.

17                  2.8     Expert: a person with specialized knowledge or experience in a matter  
18    pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert  
19    witness or as a consultant in this action.

20                  2.9     House Counsel: attorneys who are employees of a party to this action.  
21    House Counsel does not include Outside Counsel of Record or any other outside counsel.

22                  2.10    Non-Party: any natural person, partnership, corporation, association, or  
23    other legal entity not named as a Party to this action.

24                  2.11    Outside Counsel of Record: attorneys who are not employees of a party to  
25    this action but are retained to represent or advise a party to this action and have appeared in this  
26    action on behalf of that party or are affiliated with a law firm which has appeared on behalf of  
27    that party.

28                  2.12    Party: any party to this action, including all of its officers, directors,

1 employees, consultants, retained experts, and Outside Counsel of Record (and their support  
2 staffs).

3           2.13 Producing Party: a Party or Non-Party that produces Disclosure or  
4 Discovery Material in this action.

5           2.14 Professional Vendors: persons or entities that provide litigation support  
6 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
7 organizing, storing, or retrieving data in any form or medium) and their employees and  
8 subcontractors.

9           2.15 Protected Material: any Disclosure or Discovery Material that is designated  
10 as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or  
11 “HIGHLY CONFIDENTIAL—SOURCE CODE.”

12           2.16 Receiving Party: a Party that receives Disclosure or Discovery Material  
13 from a Producing Party.

14           3. SCOPE

15           The protections conferred by this Stipulation and Order cover not only Protected Material  
16 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
17 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
18 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
19 However, protections conferred by this Stipulation and Order do not cover the following  
20 information: (a) any information that is in the public domain at the time of disclosure to a  
21 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as  
22 a result of publication not involving a violation of this Order, including becoming part of the  
23 public record through trial or otherwise; and (b) any information known to the Receiving Party  
24 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who  
25 obtained the information lawfully and under no obligation of confidentiality to the Designating  
26 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

27           4. DURATION

28           Even after final disposition of this litigation, the confidentiality obligations imposed by



1 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court  
 2 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all  
 3 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after  
 4 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
 5 including the time limits for filing any motions or applications for extension of time pursuant to  
 6 applicable law. **For a period of six months after the final disposition of this litigation, this  
 court will retain jurisdiction to enforce the terms of this order.**

7 5. DESIGNATING PROTECTED MATERIAL

8 5.1 Exercise of Restraint and Care in Designating Material for Protection.

9 Each Party or Non-Party that designates information or items for protection under this Order  
 10 must take due care to limit any such designation to specific material that qualifies under the  
 11 appropriate standards. The Designating Party must designate for protection only those parts of  
 12 material, documents, items, or oral or written communications that qualify – so that other portions  
 13 of the material, documents, items, or communications for which protection is not warranted are  
 14 not swept unjustifiably within the ambit of this Order.

15 Mass, indiscriminate, or routinized designations are prohibited. Designations that  
 16 are shown to be clearly unjustified or that have been made for an improper purpose (e.g. to  
 17 unnecessarily encumber or retard the case development process or to impose unnecessary  
 18 expenses and burdens on other parties) expose the Designating Party to sanctions.

19 If it comes to a Designating Party's attention that information or items that it  
 20 designated for protection do not qualify for protection, that Designating Party must promptly  
 21 notify all other Parties that it is withdrawing the mistaken designation.

22 5.2 Manner and Timing of Designations. Except as otherwise provided in this  
 23 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
 24 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
 25 designated before the material is disclosed or produced.

26 Designation in conformity with this Order requires:

27 (a) for information in documentary form (e.g., paper or electronic documents,  
 28 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing

1 Party affix the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—ATTORNEYS’  
2 EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE CODE” in the margin of each page  
3 that contains protected material. If only a portion or portions of the material on a page qualifies  
4 for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by  
5 making appropriate markings in the margins) and must specify, for each portion, the level of  
6 protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—  
7 ATTORNEYS’ EYES ONLY”).

8           A Party or Non-Party that makes original documents or materials available for  
9 inspection need not designate them for protection until after the inspecting Party has indicated  
10 which material it would like copied and produced. During the inspection and before the  
11 designation, all of the material made available for inspection shall be deemed “HIGHLY  
12 CONFIDENTIAL—ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the  
13 documents it wants copied and produced, the Producing Party must determine which documents,  
14 or portions thereof, qualify for protection under this Order. Then, before producing the specified  
15 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL,”  
16 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY  
17 CONFIDENTIAL—SOURCE CODE”) at the top of each page that contains Protected Material.  
18 If only a portion or portions of the material on a page qualifies for protection, the Producing Party  
19 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
20 margins) and must specify, for each portion, the level of protection asserted (either  
21 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or  
22 “HIGHLY CONFIDENTIAL—SOURCE CODE”).

23           (b) for testimony given in deposition or in other pretrial or trial proceedings,  
24 unless otherwise designated before the close of deposition, pre-trial or trial proceedings,  
25 testimony given therein shall be treated as “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES  
26 ONLY” for at least fifteen (15) calendar days after the final transcript has been sent by the court  
27 reporter to counsel for the Producing Party whose information has been disclosed (or until such  
28 other date as may be agreed upon by the parties). Receipt of rough transcripts shall not trigger

1 this 15-day period. Such testimony may be designated “CONFIDENTIAL,” “HIGHLY  
 2 CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE  
 3 CODE” during the 15-day (or other agreed upon) period by written notice to all counsel  
 4 indicating the specific testimony to be designated (by page and line numbers or other specific  
 5 reference) and the level of protection being asserted (“CONFIDENTIAL,” “HIGHLY  
 6 CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE  
 7 CODE”). Unless so designated, any confidentiality is waived after the expiration of the 15-day  
 8 (or other agreed upon) period, unless otherwise stipulated or ordered.

9 (c) for information produced in some form other than documentary and for any  
 10 other tangible items, that the Producing Party affix in a prominent place on the exterior of the  
 11 container or containers in which the information or item is stored the legend “CONFIDENTIAL,”  
 12 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY  
 13 CONFIDENTIAL—SOURCE CODE.” If only a portion or portions of the information or item  
 14 warrant protection, the Producing Party, to the extent practicable, shall identify the protected  
 15 portion(s), specifying whether they qualify as “CONFIDENTIAL,” “HIGHLY  
 16 CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE  
 17 CODE.”

18 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure  
 19 to designate qualified information or items as “CONFIDENTIAL,” “HIGHLY  
 20 CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL—SOURCE  
 21 CODE” does not, standing alone, waive the Designating Party’s right to secure protection under  
 22 this Order for such material. If material is appropriately designated as “CONFIDENTIAL,”  
 23 “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” or “HIGHLY  
 24 CONFIDENTIAL—SOURCE CODE” after the material was initially produced, the Receiving  
 25 Party must make reasonable efforts to assure that the material is treated in accordance with the  
 26 provisions of this Order.

## 27 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

28 6.1 Timing of Challenges. Any Party or Non-Party may challenge a

1 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's  
2 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary  
3 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its  
4 right to challenge a confidentiality designation by electing not to mount a challenge promptly  
5 after the original designation is disclosed.

6           6.2     Meet and Confer. The Challenging Party shall initiate the dispute  
7 resolution process by providing written notice of each designation it is challenging and describing  
8 the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the  
9 written notice must recite that the challenge to confidentiality is being made in accordance with  
10 this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge  
11 in good faith and must begin the process by conferring directly (in voice to voice dialogue; other  
12 forms of communication are not sufficient) within 14 days of the date of service of notice. In  
13 conferring, the Challenging Party must explain the basis for its belief that the confidentiality  
14 designation was not proper and must give the Designating Party an opportunity to review the  
15 designated material, to reconsider the circumstances, and, if no change in designation is offered,  
16 to explain the basis for the chosen designation. A Challenging Party may proceed to the next  
17 stage of the challenge process only if it has engaged in this meet and confer process first or  
18 establishes that the Designating Party is unwilling to participate in the meet and confer process in  
19 a timely manner.

20           6.3     Judicial Intervention. If the Parties cannot resolve a challenge without  
21 court intervention, the Designating Party shall file and serve a motion to retain confidentiality  
22 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21  
23 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and  
24 confer process will not resolve their dispute, whichever is earlier. Each such motion must be  
25 accompanied by a competent declaration affirming that the movant has complied with the meet  
26 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to  
27 make such a motion including the required declaration within 21 days (or 14 days, if applicable)  
28 shall automatically waive the confidentiality designation for each challenged designation. In

1 addition, the Challenging Party may file a motion challenging a confidentiality designation at any  
2 time if there is good cause for doing so, including a challenge to the designation of a deposition  
3 transcript or any portions thereof. Any motion brought pursuant to this provision must be  
4 accompanied by a competent declaration affirming that the movant has complied with the meet  
5 and confer requirements imposed by the preceding paragraph.

6 The burden of persuasion in any such challenge proceeding shall be on the  
7 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass  
8 or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party  
9 to sanctions. Unless the Designating Party has waived the confidentiality designation by failing to  
10 file a motion to retain confidentiality as described above, all parties shall continue to afford the  
11 material in question the level of protection to which it is entitled under the Producing Party's  
12 designation until the court rules on the challenge.

13 7. ACCESS TO AND USE OF PROTECTED MATERIAL

14 7.1 Basic Principles. A Receiving Party may use Protected Material that is  
15 disclosed or produced by another Party or by a Non-Party in connection with this case only for  
16 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
17 disclosed only to the categories of persons and under the conditions described in this Order.  
18 When the litigation has been terminated, a Receiving Party must comply with the provisions of  
19 section 13 below (FINAL DISPOSITION).

20 Protected Material must be stored and maintained by a Receiving Party at a  
21 location and in a secure manner that ensures that access is limited to the persons authorized under  
22 this Order.

23 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
24 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
25 disclose any information or item designated "CONFIDENTIAL" only to:

26 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
27 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
28 information for this litigation;

- 1 (b) the officers, directors, and employees (including House Counsel) of the
- 2 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
- 3 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 4 (c) Experts (as defined in this Order) of the Receiving Party to whom
- 5 disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment
- 6 and Agreement to Be Bound” (Exhibit A);
- 7 (d) the court and its personnel;
- 8 (e) court reporters and their staff, professional jury or trial consultants, and
- 9 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
- 10 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 11 (f) during their depositions, witnesses in the action to whom disclosure is
- 12 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
- 13 (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of
- 14 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
- 15 separately bound by the court reporter and may not be disclosed to anyone except as permitted
- 16 under this Stipulated Protective Order.
- 17 (g) the author of the document or the original source of the information.
- 18 7.3 Disclosure of “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES
- 19 ONLY” and “HIGHLY CONFIDENTIAL—SOURCE CODE” Information or Items. Unless
- 20 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving
- 21 Party may disclose any information or item designated “HIGHLY CONFIDENTIAL—
- 22 ATTORNEYS’ EYES ONLY” and “HIGHLY CONFIDENTIAL—SOURCE CODE” only to:
- 23 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as
- 24 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
- 25 information for this litigation;
- 26 (b) Experts of the Receiving Party (as defined in this Order) (1) to whom
- 27 disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment
- 28 and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in

1 paragraph 7.4, below, have been followed;

2 (c) the court and its personnel;

3 (d) court reporters and their staff, professional jury or trial consultants, and

4 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
5 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

6 (e) the author of the document or the original source of the information.

7 7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL—  
8 ATTORNEYS’ EYES ONLY” Information or Items to “Experts”:

9 (a) Unless otherwise ordered by the court or agreed in writing by the  
10 Designating Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any  
11 information or item that has been designated “HIGHLY CONFIDENTIAL—ATTORNEYS’  
12 EYES ONLY” first must make a written request to the Designating Party which shall include: (1)  
13 the individual’s name and business title; (2) business address; (3) business or profession; (4) the  
14 individual’s CV, including, but not limited to, a list of any publications; (5) any previous or  
15 current relationship (personal or professional) with any of the parties; (6) a list of other cases in  
16 which the individual has testified (at trial or deposition) within the last seven years; (7) and a list  
17 of all companies with which the individual has consulted or by which the individual has been  
18 employed within the last four years.

19 (b) A party that makes a request and provides the information specified in the  
20 preceding paragraph may disclose the subject Protected Material to the identified Expert unless,  
21 within ten (10) court days of delivering the request, the Party receives a written objection from  
22 the Designating Party. Any such objection must set forth in detail the grounds on which it is  
23 based, and must provide times during which the Designating Party is available to meet and confer  
24 on the issue during the succeeding three business days.

25 (c) A Party that receives a timely written objection must meet and confer with  
26 the Designating Party (through direct voice to voice dialogue to try to resolve the matter by  
27 agreement. If no agreement is reached, the Party seeking to prevent the disclosure to the Expert  
28 may file a motion within ten court days of the meet and confer in Civil Local Rule 7 (and in

1 compliance with Civil Local Rule 79-5, if applicable). Failure to bring the motion within the  
2 required time period shall be deemed a withdrawal of the objection. Any such motion must  
3 describe the circumstances and reasons for why the disclosure to the Expert presents a risk of  
4 harm and why protection of this Order would not suffice to ameliorate such risk.  
A

5 8. SOURCE CODE

6 (a) To the extent production of source code becomes necessary in this case, a  
7 Producing Party may designate source code as “HIGHLY CONFIDENTIAL—SOURCE CODE”  
8 if it is confidential, non-public source code.

9 (b) Protected Material designated as “HIGHLY CONFIDENTIAL—SOURCE  
10 CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL—  
11 ATTORNEYS’ EYES ONLY” information, and may be disclosed only to the individuals to  
12 whom “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” information may be  
13 disclosed, as set forth in Paragraphs 7.3 and 7.4.

14 (c) Any source code covered by the “HIGHLY CONFIDENTIAL—SOURCE  
15 CODE” designation shall be made available for inspection in a format through which it could be  
16 reasonably reviewed and searched during normal business hours or other mutually agreeable  
17 times, at an office of the producing Party’s Outside Counsel. The Receiving Party may designate  
18 in which of the Producing Party’s New York or California offices production shall be made. The  
19 source code shall be made available for inspection on a secured computer in a secured room  
20 without Internet access or network access to other computers, and the Receiving Party shall not  
21 copy, remove, or otherwise transfer any portion of the source code onto any recordable media or  
22 recordable device. The secured computer shall have all external data access ports disabled,  
23 including, but not limited to, external media drives, USB slots, and/or peripheral slots. The  
24 Producing Party may visually monitor the activities of the Receiving Party’s representatives  
25 during any source code review, but only to ensure that there is no unauthorized recording,  
26 copying, or transmission of the source code.

27 (d) The Receiving Party may request paper copies of limited portions of source  
28 code that are reasonably necessary for the preparation of court filings, pleadings, expert reports,



1 or other papers, or for deposition or trial, but shall not request paper copies for the purposes of  
2 reviewing the source code other than electronically as set forth in paragraph (c) in the first  
3 instance. The Producing Party shall provide all such source code in paper form including bates  
4 numbers and the label “HIGHLY CONFIDENTIAL—SOURCE CODE.” The Producing Party  
5 may challenge the amount of source code requested in hard copy form pursuant to the dispute  
6 resolution procedure and timeframes set forth in Paragraph 6 whereby the Producing Party is the  
7 “Challenging Party” and the Receiving Party is the “Designating Party” for purposes of dispute  
8 resolution.

9 (e) The Receiving Party shall maintain a record, or inspection log, of any  
10 individual who has inspected any portion of the source code in electronic or paper form. The  
11 Receiving Party shall maintain all paper copies of any printed portions of the source code in a  
12 secured, locked area. The Receiving Party shall not create any electronic or other images of the  
13 paper copies and shall not convert any of ~~the~~ <sup>the</sup> information contained in the paper copies into any  
14 electronic format. The Receiving Party shall only make additional paper copies if such additional  
15 copies are (1) necessary to prepare court filings, pleadings, or other papers (including a testifying  
16 expert’s expert report), (2) necessary for deposition, or (3) otherwise necessary for the preparation  
17 of its case. Any paper copies used during a deposition shall be retrieved by the Producing Party  
18 at the end of each day and must not be given to or left with a court reporter or any other  
19 individual. Upon written request to the Producing Party, the Receiving Party shall within a  
20 reasonable time following the request produce to the Producing Party a copy of the Receiving  
21 Party’s inspection log showing any and all individuals who have inspected any portion of the  
22 source code in electronic or paper form.

23 9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
24 OTHER LITIGATION

25 If a Receiving Party is served with a subpoena or a court order issued in other  
26 litigation that compels disclosure of any information or items designated by the Designated Party  
27 in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES  
28 ONLY,” that Party must:

1 (a) notify the Designating Party, in writing (by fax, if possible) immediately  
 2 and in no event more than three court days after receiving the subpoena or order. Such  
 3 information must include a copy of the subpoena or court order;

4 (b) immediately notify in writing the party who caused the subpoena or order  
 5 to issue in the other litigation that some or all of the material covered by the subpoena or order is  
 6 subject to this Protective Order. Such notification shall include a copy of this Stipulated  
 7 Protective Order; and

8 (c) cooperate with respect to all reasonable procedures sought to be pursued by  
 9 the Designating Party whose Protected Material may be affected.

10 If the Designating Party timely seeks a protective order, the Party served with the  
 11 subpoena or court order shall not produce any information designated in this action as  
 12 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” before a  
 13 determination by the court from which the subpoena or order issued, unless the Party has obtained  
 14 the Designating Party’s permission. Nothing in these provisions should be construed as  
 15 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from  
 16 another court. **The Designating Party shall bear the burden and expense of seeking  
 protection in that court of its Protected Material.**

17 10. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED  
 18 IN THIS LITIGATION

19 (a) The terms of this Order are applicable to information produced by a Non-  
 20 Party in this action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL—  
 21 ATTORNEYS’ EYES ONLY.” Such information produced by Non-Parties in connection with  
 22 this litigation is protected by the remedies and relief provided by this Order. Nothing in these  
 23 provisions should be construed as prohibiting a Non-Party from seeking additional protections.

24 (b) In the event that a Party is required, by a valid discovery request, to  
 25 produce a Non-Party’s confidential information in its possession, and the Party is subject to an  
 26 agreement with the Non-Party not to produce the Non-Party’s confidential information, then the  
 27 Party shall:

28 1. promptly notify in writing the Requesting Party and the Non-Party

1 that some or all of the information requested is subject to a confidentiality agreement with a Non-  
2 Party;

3 2. promptly provide the Non-Party with a copy of the Stipulated  
4 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific  
5 description of the information requested; and

6 3. make the information requested available for inspection by the  
7 Non-Party.

8 (c) If the Non-Party fails to object or seek a protective order from this court  
9 within 14 days of receiving the notice and accompanying information, the Receiving Party may  
10 produce the Non-Party's confidential information responsive to the discovery request. If the Non-  
11 Party timely seeks a protective order, the Receiving Party shall not produce any information in its  
12 possession or control that is subject to the confidentiality agreement with the Non-Party before a  
13 determination by the court.<sup>1</sup> Absent a court order to the contrary, the Non-Party shall bear the  
14 burden and expense of seeking protection in this court of its Protected Material.

15 11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

16 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed  
17 Protected Material to any person or in any circumstance not authorized under this Stipulated  
18 Protective Order, the Receiving Party must immediately (a) notify in writing the Designating  
19 Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of  
20 the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were  
21 made of all the terms of this Order, and (d) request such person or persons to execute the  
22 "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

23 12. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
24 PROTECTED MATERIAL

25 When a Producing Party gives notice to Receiving Parties that certain  
26

27 <sup>1</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality  
28 rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality  
interests in this Court.

inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

13. MISCELLANEOUS

13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

13.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the information in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

14. FINAL DISPOSITION. Within 60 days after the final disposition of this

1 action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the  
 2 Producing Party or destroy such material. As used in this subdivision, “all Protected Material”  
 3 includes all copies, abstracts, compilations, summaries, and any other format reproducing or  
 4 capturing any of the Protected Material. Whether the Protected Material is returned or destroyed,  
 5 the Receiving Party must submit a written certification to the Producing Party (and, if not the  
 6 same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by  
 7 category, where appropriate) all the Protected Material that was returned or destroyed and (2)  
 8 affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries  
 9 or any other format reproducing or capturing any of the Protected Material. Notwithstanding this  
 10 provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial,  
 11 deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial  
 12 exhibits, expert reports, attorney work product, and consultant and expert work product, even if  
 13 such materials contain Protected Material. Any such archival copies that contain or constitute  
 14 Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

15  
 16 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD:

17  
 18 DATED: February 1, 2011

/s/ Theresa A. Sutton /s/

Theresa A. Sutton  
 ORRICK HERRINGTON & SUTCLIFFE, LLP  
 1000 Marsh Road  
 Menlo Park, CA 94025  
 Attorneys for Plaintiff  
 FACEBOOK, INC.

22  
 23 DATED: February 1, 2011

/s/ Scott A. Bursor /s/

Scott A. Bursor  
 Bursor & Fisher, P.A.  
 369 Lexington Ave., 10<sup>th</sup> Floor  
 New York, NY 10017  
 Attorneys for Defendant  
 POWER VENTURES, INC., STEVE VACHANI, and  
 POWER.COM

27 ///

28 ///

**Filer's Attestation:** Pursuant to General Order No. 45, §X(B), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from its signatory.

Dated: February 1, 2011

Respectfully submitted,

/s/ Theresa A. Sutton /s/  
Theresa A. Sutton

**AS MODIFIED BY THE COURT,  
PURSUANT TO STIPULATION, IT IS SO ORDERED:**

 $\wedge$ 

DATED: February 4, 2011

~~JAMES WARE~~ HOWARD R. LLOYD  
United States ~~District~~ Judge  
Magistrate

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of \_\_\_\_\_ [insert] formal name of the case and the number and initials assigned to it by the court.]. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint \_\_\_\_\_ [print or type full name] of \_\_\_\_\_ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_  
[printed name]

Printed name: \_\_\_\_\_  
[signature]

**FACEBOOK, INC.,**  
**PLAINTIFF,**  
**V.**  
**POWER VENTURES, INC. DBA POWER.COM, ET AL,**  
**DEFENDANTS**

---

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**  
**CASE NO. C-08-05780-JW**  
**EXPERT REPORT OF BOB ZEIDMAN AND LAWRENCE MELLING**

**ZEIDMAN CONSULTING**

**DECEMBER 19, 2011**

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I



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We, Bob Zeidman and Lawrence Melling, on behalf of Zeidman Consulting, provide the following expert disclosures.

## **I. SUMMARY OF FINDINGS**

1. Based upon the review of Defendants' source code for various code projects named PowerScript, PowerNavigator, PowerProxy, and spider, as well as other documentation produced to date, we have concluded the following:

(a) Defendants developed proprietary software named PowerScript and spider in order to crawl various social network websites, including particularly [www.facebook.com](http://www.facebook.com) ("Facebook"), to extract or "scrape" website user information such as Facebook photo images, wall content, friends' lists, and the like, and to then reformat that user information on Defendants' own website, [www.power.com](http://www.power.com) ("Power.com" or "the Power website"), in order to "proxy" Facebook and permit Defendants' own website users to log into Facebook through Defendants' own Graphical User Interface ("GUI"), rather than through Facebook's interface.

(b) Defendants designed their proprietary PowerScript and spider software to automatically post on the Facebook website new Events soliciting Facebook users to join Power.com as part of what Defendants called the "Power 100" or "100x100x100" Campaign. Defendants likewise designed their software to automatically post Power Invitations on Facebook users' Walls soliciting them to join Power.com.

(c) Based upon available information from Defendants' databases, at least 39,137 users of the Power website also had Facebook accounts. Because of missing information from those databases that is solely in the control of Defendants, we were unable to quantify exactly how many Facebook Event or wall posting transactions took place between the Power website and Facebook in which Facebook users were solicited to join Power.com. We are able to state that both kinds of solicitations did occur, however, and were initiated by Defendants' proprietary software.

(d) In addition to the electronic mail communications that Defendants' software automatically posted on the Facebook website when it created Facebook Events and when it posted Facebook wall messages, the same proprietary software that Defendants used to automatically create Event notifications and post Facebook Wall messages also would initiate automated "spam" email messages being sent on Defendants' behalf to Facebook users as a result of the software's ability to exploit Facebook's own email notification processes.

(e) Defendants designed their network architecture to circumvent technical barriers – such as blocks of IP addresses – that Facebook and other websites put in place to block the Power website's continued access. Defendants' source code includes routines that create a list of proxy servers. These proxy servers were continuously monitored by Defendants' software to determine if they were blocked by a website like Facebook. When blocked, the software could add a new host IP address for the PowerScript to access that would be employed to ensure continued access to the blocking website.

(f) Defendants formerly maintained "Power\_Logger" and Async databases which logged information concerning the number of times Facebook users were contacted by the Power website and/or Power users. Among the information that was formerly contained in one or both of those databases was information identifying how many times Facebook users were sent invitations, either through Event notifications or Wall posts, to join Power.com as part of the "Power 100" or 100x100x100 campaign. That information, which was solely within the control of Defendants to document in its databases, has been deleted, preventing Facebook from knowing the true total number of spam invitations that were sent as a result of the execution by Defendants of their PowerScript software.

## **II. BACKGROUND**

2. This introductory section of our report gives information about our qualifications.

**A. PERSONAL EXPERIENCE AND BACKGROUND OF BOB ZEIDMAN**

3. Robert is an engineer and the founder and president of Zeidman Consulting, which provides engineering consulting services to high-tech companies. Among the types of services Robert provide are hardware and software design. My clients have included Fortune 500 computer and technology companies as well as smaller companies and startups. A copy of my resume is attached hereto as Exhibit A.
4. Robert holds a Master's degree from Stanford University in Electrical Engineering and two Bachelor's degrees from Cornell University, one in Electrical Engineering and one in Physics.
5. Robert has been a computer software and hardware designer for over 25 years. Robert have designed and developed a variety of computer hardware and software products. These software products include Internet-based training courses and web-based course administration software, an operating system synthesis tool, a source code comparison tool, a network emulation software bridge, and a remote backup system whereby user data is automatically transmitted and stored at a remote location. Robert have founded several companies including eVault, a remote backup company; the Chalkboard Network, an e-learning company; Zeidman Technologies, a company that develops software tools for enabling and improving hardware and software development; and Software Analysis and Forensic Engineering Corporation, a company that develops software analysis tools.
6. Robert has written a variety of papers, books, and presentations on computer hardware and software and other engineering subjects. Robert am the developer of the Universal Design Methodology, a process for efficiently developing reliable systems, about which Robert have written extensively. A list of my publications is included in my resume attached as Exhibit A.
7. Robert holds a number of patents for software synthesis, hardware emulation, hardware synthesis, hardware simulation, and software code comparison. Robert have created a tool called CodeSuite® that incorporates BitMatch®, CodeCross®, CodeDiff®, CodeMatch®,

CodeCLOC®, and SourceDetective® for detecting whether one computer program has been plagiarized from another computer program.

8. Robert has consulted on matters involving intellectual property disputes, including instances of alleged misappropriation and infringement. My work in this capacity has included, among other things, reviewing and analyzing software source code, reviewing and analyzing patents, reverse engineering hardware and software, writing expert reports, and testifying in court.
9. Robert has testified at deposition and at trial in a number of cases involving software copyright infringement, trade secret theft, and patent infringement. The specific cases can be found in my resume, attached as Exhibit A.

#### **B. PERSONAL EXPERIENCE AND BACKGROUND OF LAWRENCE MELLING**

10. Lawrence is a research engineer at Zeidman Consulting. Lawrence has over 30 years of executive management and engineering experience in developing new hardware and software technologies and bringing them to market. Lawrence has been engaged in applications engineering and marketing of electronic design automation (EDA) tools at major companies and small startups. Lawrence has also been involved in the development of sophisticated tools for source code and object code analysis for finding intellectual property infringement. Lawrence has not previously testified at trial or in a deposition. My resume is attached as Exhibit B to this report.

### **III. DEFINITIONS**

This section provides a discussion of technical terms needed to understand this report, which we are prepared to further explain at trial.

#### **A. WEBSITE**

11. A “website” is a location on the World Wide Web that contains a group of web pages typically created using a popular programming language called the Hypertext Markup Language (HTML). Websites are usually connected to each other using “hyperlinks,” and

are made available to the public by an individual, company, educational institution, government body, or other organization. These web pages are hosted on one or more computers called “web servers” and are viewed by users on “client computers” that are connected to the web servers via the Internet. The web pages are viewed using an Internet browser, such as Microsoft’s Internet Explorer. In conjunction with this Expert Report, we make extensive reference to two websites located at the Uniform Resource Locators (“URLs”) <http://www.facebook.com> (the “Facebook website”) and <http://www.power.com> (“Power.com” or the “Power website”).

## **B. INTERNET BROWSER**

12. An “Internet browser” or web browser is a typical client application used to navigate the Internet. The browser accesses information such as web pages, images, videos, and games from Internet servers. The URL is the “address” through which online information is located and retrieved by the user from her client computer. Servers may provide static information to an Internet browser or may dynamically generate the information that is transmitted to an Internet browser based on input from the user and the internal state of the server. The browser provides the graphical user interface (GUI) to the web pages on the server. However, some websites make use of client-side software to offload processing from the server to use the client’s computer. This is important because the browsers include functionality to execute client-side “web scripts,” which concept we discuss below. Three popular Internet browsers in use today are: Microsoft’s Internet Explorer, Mozilla’s Firefox, and Google’s Chrome.

## **C. CLIENT**

13. A “client” is a computer that makes a service request to a server (defined below); the server fulfills the request. Computer interactions using the client/server model are very common. For example, when an individual checks a bank account from his or her computer, a client

program in the individual's computer forwards the request to a server program at the bank. The bank's program may respond, or it may, in turn, forward the request to its own client program that makes a request to another bank computer. With regard to the World Wide Web, the browser on an individual's computer is a client program. A client application can also be referred to as the "front-end" and the server application is often called the "back-end."

#### **D. SERVER**

14. A "server" is a computer on a network (such as an internal corporate network or the Internet) that is dedicated to a particular purpose; it stores information and performs critical functions. For example, a "database server" could store all of an organization's data on a single machine, while providing database services to multiple users anywhere in the office, or even the world, and while also allowing access and control over the data. A typical "database server" will allow users to utilize their data from custom applications designed to meet their specific needs. Server software refers to software running on the server computer that "serves up" information to a client computer. With regard to the World Wide Web, a web server responds to web client requests to view web pages. These pages can be static (content doesn't change) or dynamic (content is determined when requested).

#### **E. PROXY SERVER**

15. A proxy server is a machine used to relay Internet transactions between clients and websites such that the transactions with the website appear to originate from the proxy server's IP address. An IP address is the Internet Protocol address used to identify a machine, such as a server or proxy server, connected to the Internet. Proxy servers are used for a number of purposes, including the following activities: (a) keeping machines behind the proxy (such as the website's actual host servers) anonymous; (b) speeding up access to resources frequently used by multiple users behind the proxy by using caching techniques; (c) controlling access



to website content or services; (d) accessing websites from a computer whose own IP address otherwise would be blocked by the accessed website; (e) logging or auditing Internet use; and (f) circumventing security procedures or controls aimed at limiting access to or blocking a particular IP address.

#### **F. WEB SCRIPTS**

16. “Web scripts” are written to generate dynamic web pages -- that is, web pages with rapidly changing content and imagery or content that must be somehow calculated via software mechanisms. For example, webscripts can be used to calculate and display the total visitor count to a website. Such scripts are written in a variety of scripting languages such as PHP, CGI, Perl, and JavaScript. Some scripts run on the web server (server-side), while other scripts run on the user’s machine (client-side). Such webscripts also can be embedded within HTML in order to affect the behavior of web pages. Of the languages mentioned, JavaScript is the language of choice for client-side scripting and is supported by all the Internet browsers popularly in use, while PHP, CGI, and Perl are popular for server-side scripting.
17. In Microsoft Windows systems, component-based scripting is implemented through a technology called “Active Scripting,” and employs what are commonly called “script engines.” One particularly popular form of a server-side Active Scripting engine is called ASP, or “Active Server Pages,” which is used to develop dynamically-generated web page content.

#### **G. WEB CRAWLER OR SPIDER**

18. A “web crawler” or “spider” is a computer program used to browse the Internet in a systematic, comprehensive way. Web crawlers are typically associated with search engines and are used to collect website information for search engine indexing. Nonetheless, spiders and web crawlers are now commonly being used to collect or “harvest” web page information for non-search related applications such as web scraping. Web scraping can be

used to locate input fields and variable fields that allow a program to automatically fill out forms to login, send messages, request information, or any other website activity initiated by the filling out of a form. Because web scraping often is employed by entities for unwanted or unlawful purposes (like Defendants' harvesting of user information such as "friends' lists," and similar data from Facebook in order to later use that information to send "spam" email and electronic mail messages), many website operators (including Facebook) publish Terms of Use provisions that prohibit the use of web scrapers on their websites by their registered users.

## **H. COMPUTER DATABASE**

19. Computer databases consist not only of data, such as user names and addresses, but also consist of schema and procedures represented by source code. The term "schema" refers to the structure of the database, including where to place the data, how to organize the data, and the particular relationships between the data. For example, customer names may be placed in a field called "Name," and that name is referenced in a table called "Customers." A table can be visualized as a spreadsheet and the field would correspond to a particular column in the spreadsheet. In a database there are many different tables. Each customer name may have an associated table that has fields that contain the customer's address, credit card number, account balance, and comments about the customer. The table names, field names, types of data in the fields, and relationships between different tables and different fields constitute the schema of the database, which is described using a special programming language such as the Structured Query Language, also known as SQL. Two popular forms of SQL servers are MySQL, an open source relational database management system, and Microsoft SQL Server (MSSQL).
20. Procedures for manipulating the data may also be stored in databases and are represented by a special programming language such as SQL. These "stored procedures" can be used by programs that access the database to manipulate the data in the database. For example, a

stored procedure may exist to compute the average outstanding balance for a list of customers. A program that is written to access the database could also access the stored procedure in order to calculate this average.

## **I. SQL SERVER**

21. Microsoft SQL Server (MSSQL) is a relational database management system. A relational database is a sophisticated method of grouping data together based upon common attributes to provide greater speed and reliability for data access.
22. SQL tables will often involve common English words, but the sequence of items is usually arbitrary. The tables are used to organize data, and do not have to be in any specific order to function correctly. Each specific category of data is known as a tuple. There is no order imposed upon how the tuples are organized. The order of tuples in a relational database is arbitrary. If similar or identical sequences of elements are found in a SQL table, it can be a sign of copying despite the elements having common names.

## **J. SOURCE CODE**

23. In computer science, “source code” is a kind of text that is written using the format and syntax of the programming language that it is being written in, and typically is the only format that is readable by humans. Computer programs can be written using complex instructions that look like English. For example, the instruction  $a = b * c + 2$  tells the computer to take the number stored in memory and represented by variable  $b$ , multiply that by the number stored in memory and represented by the variable  $c$ , add 2 and store the result in memory represented by the variable  $a$ . Similarly, the statement `printf(“Hello world!”)` tells the computer to print the words “Hello world!” to the computer screen. These high-level, English-like instructions are the “source code.” Computer programs are made up of many lines of source code and the process of writing these lines of code is called programming. Eventually these lines of source code are turned into instructions that a computer

understands, consisting of sequences of electronic ones and zeroes. The process of turning human-readable source code into a file containing computer instructions is called “compiling” and is performed by a special computer program called a “compiler.” In some cases, source code is run directly by a computer, without creating any file of computer instructions.

24. Source code comes in a variety of programming languages, some of which are called “low level” programming languages, and others which are called “high level” programming languages. PHP, Perl, Java, JavaScript, and SQL all are examples of high level programming languages. Other popular examples of high level source code programming languages are ones called C, C++, C#, Smalltalk, APL, AppleScript, Ruby and Python.

#### **IV. SCOPE OF REPORT**

25. Based on our background and experience, we have been asked to provide our opinions and conclusions related to (1) whether Defendants’ source code contained evidence of attempts by Defendants to access Facebook, scrape Facebook, download data from Facebook, contact Facebook, and/or use information scraped/and or downloaded from Facebook to “proxy” the Facebook website; (2) whether Defendants’ source code reflects evidence that Defendants used their software to establish Facebook Events and/or wall messages inviting Facebook witnesses to automatically receive electronic mail messages or email messages inviting them to join the Power website; (3) whether Defendants developed technology to circumvent any attempted block by Facebook of the IP addresses used by Power.com to connect with Facebook; and (4) whether there is evidence that Defendants ever included information related to their Power100 (or 100x100x100) marketing campaign in their Power\_Logger or Async databases. We have reviewed literally hundreds of thousands of lines of code to reach our opinions. In addition, in reaching the opinions and conclusions discussed herein, we received, considered, and/or relied upon the following materials, copies of which are not attached but can be provided upon request:

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- Power Source Code Documents, which now include 5,743,505 lines of code.
- Sixty-nine SQL Server database backup files.
- We used Understand by Scientific Toolworks, Inc. to help analyze the software.
- Microsoft SQL Server 2008 to extract the databases from the backup files and to review the database contents.
- Fifty-five PowerScript Source files extracted from the PowerScript\_bkp\_full.bak database backup file.
- Numerous source code files provided as exhibits to this report.
- The transcript and Exhibits from the July 20, 2011 deposition of Defendant Steve Vachani, and the testimony from, and Exhibits used at, the December 14, 2011 deposition of Zak Mandhro.
- The December 12, 2011, Declaration of Steve Vachani in Support of Defendants' Oppositions to Facebook's motions for summary judgment.
- Facebook's source code for "Create an Event."
- Emails, technical documents and marketing documents produced by Defendants and third-party witnesses in discovery in this litigation, which are referenced in this Report.

26. We have been retained to review and analyze the source code and databases produced by Defendants in this action. We reviewed code and databases produced by Defendants on August 25-26, 29-30, September 6-7, October 19 and 25, 2011, November 1-4, 7-9, 11, 16, and 19-21, December 12-13 and December 15-16. Copies of our "Power Source Code Inspection Logs" maintained in accordance with the Protective Order entered in this case are attached hereto and combined as Exhibit C.

## **V. COMPENSATION**

For the work of Lawrence Melling on this matter Zeidman Consulting is being compensated at a

rate of \$200 per hour. For the work of Bob Zeidman, Zeidman Consulting is being compensated at a rate of \$750 per hour

## **VI. ANALYSIS**

Our analysis is broken into five sections:

- We analyze how Defendants’ software was used to connect to the Facebook website, spider the Facebook website, scrape Facebook user content and user information from the Facebook website, download Facebook user information and user content to the Power website, and to emulate or “proxy” Facebook as part of the Power website’s social aggregation services.
- We analyze how Defendants’ software was used to initiate spam emails via the PowerScripts developed to create content on Facebook. We provide a detailed analysis of the CREATE\_EVENT\_FACEBOOK and PN\_SEND\_SCRAP\_FACEBOOK scripts that were used to create Facebook Events for the Power 100x100x100 campaign, and which were also used to post Power invitations on Facebook users’ Walls.
- We discuss how the Power databases identify Facebook information stored in the databases. We also show why we were unable to determine how many Power.com transactions occurred with Facebook users, because the relevant information was deleted some time after it was originally stored.
- We analyze Defendants’ efforts to circumvent Facebook’s IP Blocks: The Power proxy system developed to manage and control a pool of proxy servers used to access sites like Facebook in order to circumvent IP blocks like the ones put in place by Facebook.

- We have also included a short section providing a review of the technical accuracy of certain arguments made by Defendant Steve Vachani in his December 12, 2001 declaration.

**A. DEFENDANT’S SOFTWARE USED TO CONNECT TO THE FACEBOOK WEBSITE, SPIDER THE FACEBOOK WEBSITE, SCRAPE FACEBOOK USER INFORMATION FROM THE FACEBOOK WEBSITE, DOWNLOAD FACEBOOK USER INFORMATION TO THE POWER WEBSITE, AND TO “PROXY” FACEBOOK**

27. In analyzing the Defendants’ source code, we determined that there were two core software components developed to retrieve information and post information to social network sites like Facebook. The two components are the PowerScript system and the PowerProxy system. The PowerScript system is best described as a web scraping system. A web scraper is software that can programmatically access web sites and perform operations intended to be done by a person, such as filling out forms, sending messages, and reading content. Web scrapers are also referred to as webbots, or simply “bots.” Web scraping is generally not allowed under most websites’ terms of use, and is considered a form of pirating by those websites. Also, because programmed transactions with a website can occur much faster than human transactions, a website’s access can be slowed down or halted through a rapid succession of programmed transactions. Web sites that do allow other sites to programmatically access information would typically offer these services through a web service interface or an API (application program interface), as Facebook does with its Facebook Connect service, in order to manage and control these programmed transactions and maintain a reliable website.

28. Because web scraping is prohibited by most websites, one challenge to creating a web scraper is to avoid detection. One of the easiest ways to detect a web scraper is to look at the number of transactions coming from a specific Internet Protocol Address (IP address). To avoid detection it is common for sophisticated web scrapers to use proxy servers to scrape information. A proxy server is a machine that acts as a relay, so the website sees the IP address of the proxy server, and not of the actual machine running the scraper. By using a

pool of proxy servers it is possible to reduce a website's ability to detect the scraper by dispersing the transactions across the pool of proxy servers. Additionally, if one of the proxy servers is detected, the other servers can continue to maintain access even if the website blocked access for the detected server.

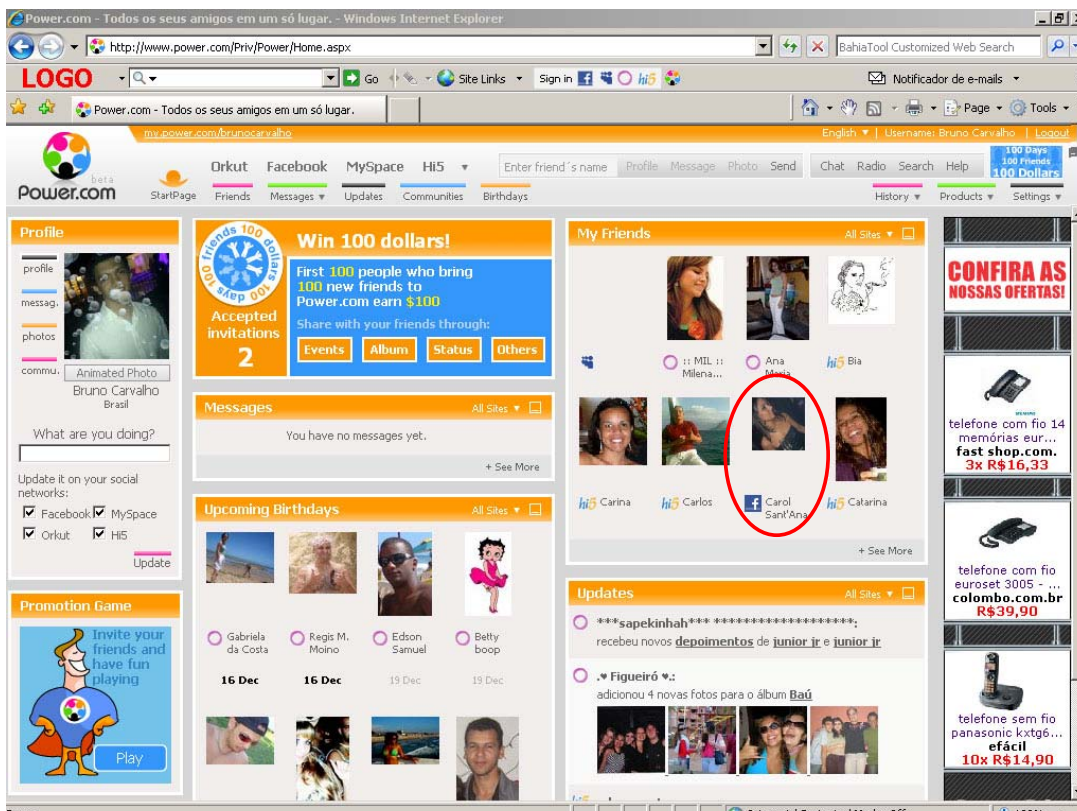
29. Our analysis shows that the Defendants developed the PowerScript system and PowerProxy system to scrape information from Facebook, proxy the Facebook website and avoid detection when engaged in such activities. In addition, our analysis shows how Defendants' programmed access initiated actions that resulted in unwanted commercial "spam" messages being sent to Facebook users soliciting them to join Power.com.
30. We analyzed 33 out of 55 PowerScripts written to perform transactions with Facebook's website. PowerScript is a scripting language developed by Power to programmatically obtain information from web pages, and write or post information, to web pages without requiring user interaction. Table 1 categorizes the scripts we reviewed. Of those, scripts use HTTP GET to read information from the Facebook website, and others use HTTP POST to post information on the Facebook website. These scripts were developed by Defendants for performing transactions on the Facebook site, are specific to Facebook, and would not work if targeted to another site. The developers writing these scripts would have been required to access Facebook via a Facebook user account to examine the HTML source in order to write a script to get or post Facebook information.

PowerScript Name	Function
PN_LOGIN_FACEBOOK	Post to login to Facebook
PN_VALID_CONTEXT_FACEBOOK	Get logout link to verify login is active
accept_friend_invitation_FACEBOOK	Post to accept Facebook friend invitation
CREATE_EVENT_FACEBOOK	Post to create Facebook Event and invite list of friends or all friends if no list is provided
JOIN_COMMUNITY_FACEBOOK	Post to join a Facebook group
PN_SEND_SCRAP_FACEBOOK	Post message to Facebook friend Wall
PHOTO_CREATE_ALBUM_FACEBOOK	Post a new Facebook photo album
PN_SEND_PRIVATE_MESSAGE_FACEBOOK	Post send private Facebook message to a Facebook friend
TUBESPREE.PutQuickEmbedInFacebook	Post new video link to Facebook



PN_SET_STATUS_FACEBOOK	Posts Facebook status update
PN_GET_FRIEND_PICKER_FACEBOOK	Get Facebook friend id and name
PN_GET_BIRTHDAYS_FACEBOOK	Get Facebook friends' birthdays
PN_GET_COMMUNITIES_FACEBOOK	Get Facebook group information (id, name, description, photo link, number of members)
PN_GET_PRIVATE_MESSAGE_FACEBOOK	Get Facebook messages for subject, message, friend Id, name, photo and message link, reply link, PrivateLock
PN_GET_ALBUM_LIST_FACEBOOK	Get Facebook photos for album id, name, date, dateorder, image, link
PN_GET_ALL_SCRAP_MESSAGE_FACEBOOK	Get Facebook Wall posts and messages - messages same as PN_GET_PRIVATE_MESSAGE_FACEBOOK and wall posts the same as PN_GET_SCRAP_FACEBOOK
PN_GET_FRIENDS_INVITATIONS_FACEBOOK	Get friend invitations for friend id, photo, name, and link
PN_GET_FRIENDSUPDATES_FACEBOOK	Get friend update, name, id,fullname, and update link
PHOTO_GET_ALBUM_LIST_FACEBOOK	Get list of photo albums
GET_HTML_PAGE	Get an entire HTML page
GETALBUMLIST_FACEBOOK	Get photo album list
OBTERIMAGEMFACEBOOK	Get photo page
GET_PROFILE_FACEBOOK	Get profile information (id, name,photo link, gender,birthday, email, phone, mobile phone,website link, city, country, relationship status, interests, favorite music, favorite TV shows)
PN_GET_SCRAP_FACEBOOK	Get Wall for friends photo, ID, Name, Date of post, content, encoded content, post id, post link, subject and showPrivateLock
PN_GET_AMOUNT_COMMUNITIES_FACEBOOK	Get/counts number of groups
DELETEALBUMPHOTO_FACEBOOK	Post to remove a Facebook photo album
PN_DELETE_SELECTED_PRIVATE_MESSAGE_FACEBOOK	Post to remove Facebook message
UNJOIN_COMMUNITY_FACEBOOK	Post to remove user from Facebook group
PN_DELETE_SELECTED_SCRAP_FACEBOOK	Post to remove Wall message
PHOTO_DELETE_PHOTO_FACEBOOK	Post to remove a Facebook photo
GET_VIDEO_FACEBOOK	Get a Facebook video (name, id, url, thumbnail, width, height)
PN_GET_FRIENDS_FACEBOOK	Get a list of friends(ids, names,and photo urls)
PN_LOAD_ATTRIBUTES_FACEBOOK	Gets name, id, photo url, gender, country

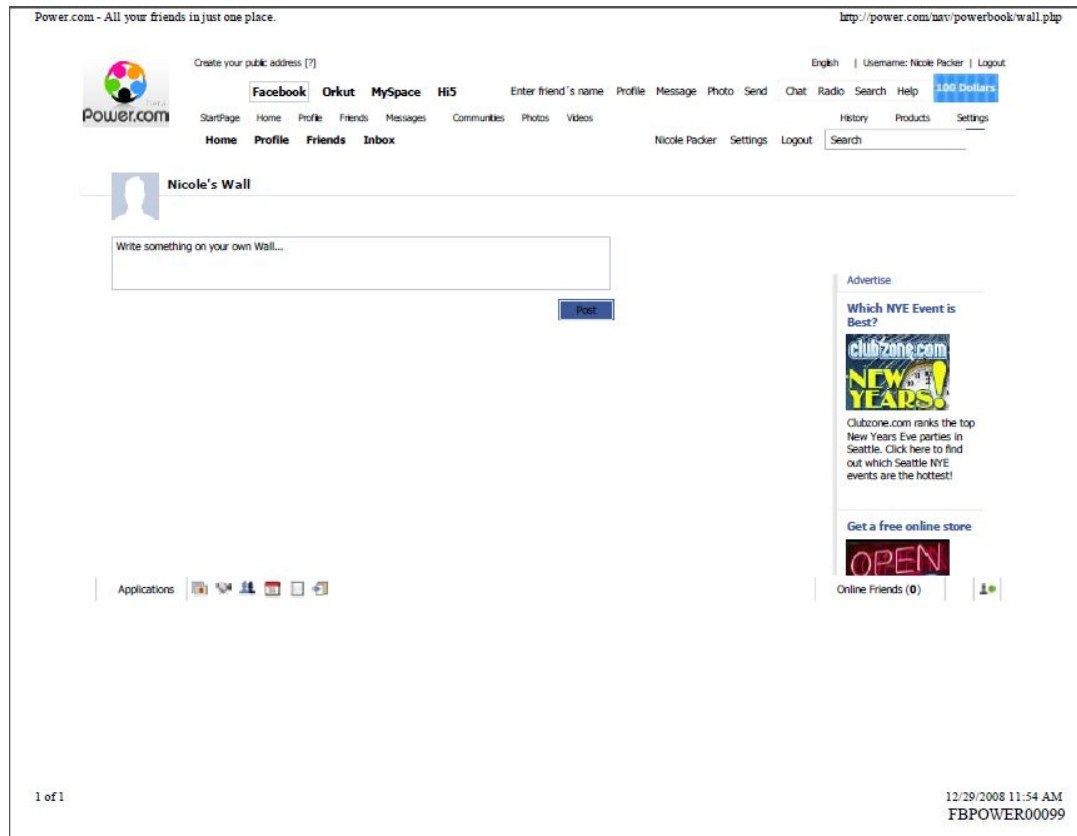
Table 1: PowerScripts analysis summary



**Figure 1: Power.com Screenshot including a Facebook friend**

31. The Power.com screenshot (found on page 2 of the toolbar\_en.ppt presentation in directory SVN\apresentacoes\20081210 – toolbar) shown in Figure 1 is an example of how information from Facebook, gathered using PowerScripts, including the ones analyzed in Table 1, was included and framed inside the Power.com web page. In this example the scraped information includes a Facebook friend's photo (see red circle).
32. Defendants sometimes misleadingly call their Power.com website a "browser." For instance, Mr. Vachani referred to Power.com as a browser both at his deposition and in his December 12, 2011 Declaration. We don't believe that is an accurate description of Power.com's functionality. From our examination of Defendants' source code, and as further discussed below in conjunction with our discussion of Mr. Vachani's December 12, 2011 Declaration, Defendants developed software called Power Navigator which supported a browser style interface where the Facebook website could be displayed within Power.com, as shown in

Figure 2.



**Figure 2: Screenshot of Facebook webpage embedded in Power.com web page**

However, as we noted, the majority of PowerScript scripts directed to Facebook were not directed to browsing functions, but instead were written to programmatically obtain and post information to Facebook without user interaction. Such functionality cannot rationally be called browsing..

## **B. DEFENDANTS' SOFTWARE USED TO INITIATE SPAM EMAILS**

33. We also examined two of the PowerScripts (CREATE\_EVENT\_FACEBOOK and PN\_SEND\_SCRAP\_FACEBOOK) in more detail and found that each was responsible for initiating a sequence of programmed transactions to create a Facebook Event and post

Facebook Wall messages. These PowerScripts require Power's software and infrastructure to execute and, once executed, resulted in SPAM electronic messages being sent to Facebook users. These scripts were developed for a specific purpose, and that was to automate the creation of Facebook Events and posting of Facebook Wall messages.

34. The `CREATE_EVENT_FACEBOOK` script automatically set Power as the host of the event, and identified Power as the "location" for the event in Facebook's Event tool (see Exhibit D, `CREATE_EVENT_FACEBOOK.xml`, at lines 37 and 41).
35. The script also generated a guest list if one was not provided. To generate the guest list, Defendants' software accesses the user's Facebook "friendsList" and extracts the user ID of each friend to create the guest list. See Exhibit D, at lines 46-51. The PowerScript executes this code, if no guest list is provided, to automatically create a guest list from the user's list of friends on Facebook. Specifically, the PowerScript application checks a "variable" (a named element to store information) called the Guestlist ("`listaConvidados`"), and then executes a sequence of programming commands inside a "rule block," identified by the beginning tag "`<rule>`" and terminated by the ending tag "`</rule>`," if it is empty. Through this process, the PowerScript software creates a new variable called "`friendsList`," and another variable called "`ids`," which combine to create the Event guest list made from one Facebook user's list of Facebook "friends."
36. The script also automatically sends Facebook Event invitations to each Facebook user in the guest list on behalf of the Power website (see Exhibit D, at lines 58-74), and these Event invitations initiate spam messages being sent to the Facebook invitees.
37. We also looked to determine if Defendants, or the user, caused the Facebook "Events" to be initiated. From the code that has been provided to date, we could not locate any code in `CREATE_EVENT_FACEBOOK` that requested the user's approval to send the "Event" invitations. We also were unable to find any other code requesting that the user accept or approve sending the Facebook Event invitations on behalf of the Power.com website.
38. The PowerScript software also created the text used to invite Facebook friends to

participate in the “100x100x100” campaign. The message contents were stored in resource files, which are files used by Microsoft Visual Studio development tools to store information for access by a program. Notably, in this example there were three resource files found with the same content in three different languages: English, Spanish, and Portuguese (*see* Exhibit E, `PowerCallBack.aspx.en.resx`, found in directory `SVN\power.com\Power.Com\Pub\Http\App_LocalResources`, at lines 132-137).

```

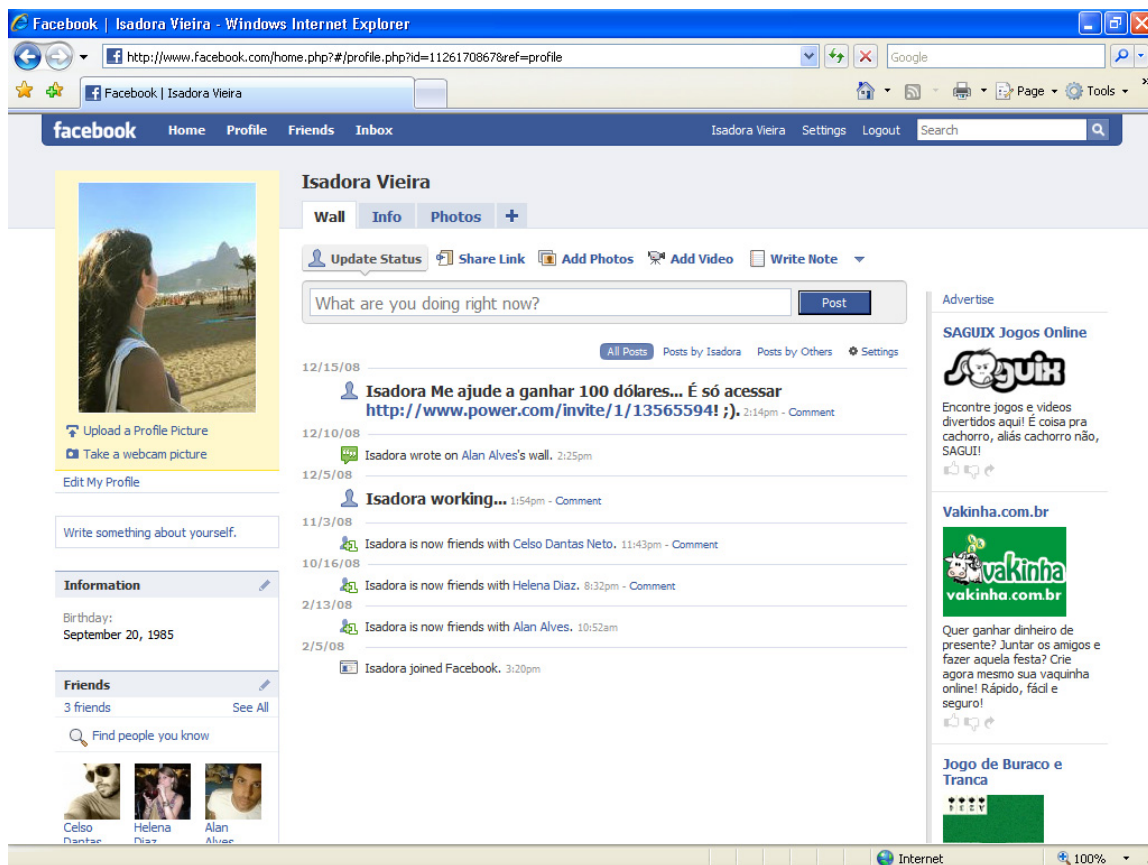
132 <data name="CAMPAIGNMESSAGE" xml:space="preserve">
133   <value>#BREAK##BREAK#I am competing for the $100
prize in the 100x100x100 promotion and recommend you to
participate too!#BREAK#Learn more at:</value>
134 </data>
135 <data name="CAMPAIGNMESSAGE2" xml:space="preserve">
136   <value>First 100 people who bring 100 new friends to
Power.com earn $100. Come and participate too:</value>
137 </data>

```

These messages were created and authored by Defendants to promote joining Power.com. When used with the `CREATE_EVENT_FACEBOOK` script, the messages would result in all of a Power.com user’s Facebook friends being automatically invited to join Power.com, and the friends then receiving spam emails as a result.

39. These strings include the actual language that was sent to Facebook users as a result of the Power.com website’s execution of the “`CREATE_EVENT_FACEBOOK`” script. The excerpt above shows that the text string stored for `CAMPAIGNMESSAGE` and another for `CAMPAIGNMESSAGE2` are both human-readable messages used in promoting the 100x100x100 campaign to Facebook users.
40. The html code for the Power.com web page that would initiate the creation of Facebook Events for this campaign was not found in the software sources provided. We believe this omission arises from the fact the Power 100 campaign was from an earlier date than the source provided. Since the source repository that would allow us to return to earlier software

releases was corrupted when we received it from Defendants, we were unable to find the html code that initiated these campaign events. However, we know from other sources, such as Mr. Vachani's deposition and the PowerScript source code that we reviewed, that such initiation of Facebook Events by the Power.com web page did, in fact, occur. For instance, in Figure 3, we offer a screenshot that shows a Power 100x100x100 campaign message posted on a Facebook user's Wall. This screen capture image produced by Defendants corroborates the occurrence of the Facebook Event and Wall posting transactions. See facebook.jpg found in directory SVN\apresentacoes\20090120 - Intersite Connect\Source\ícones image file:



**Figure 3:** Facebook Wall screenshot showing Power 100x100x100 campaign invitation

41. Additionally, we were able to examine some of the actual email messages sent when a wall

message was posted in response to Defendants creating an Event to invite a user to the Power100 or 100x100x100 campaign. The messages shown in Figure 4 are actual emails sent to Defendant Steve Vachani when his friends used the Power.com site to execute the PowerScript software made available through the html code to create Power 100 Events, and to thereby invite their Facebook friends to participate in the campaign.



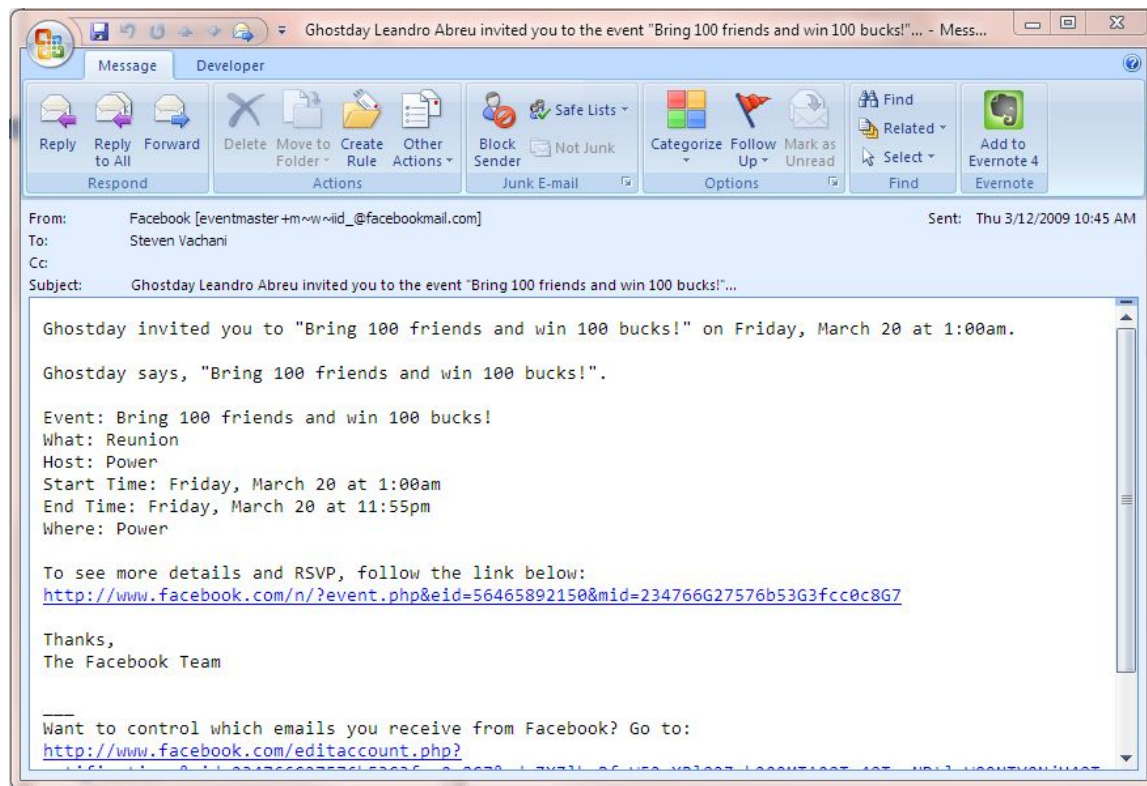
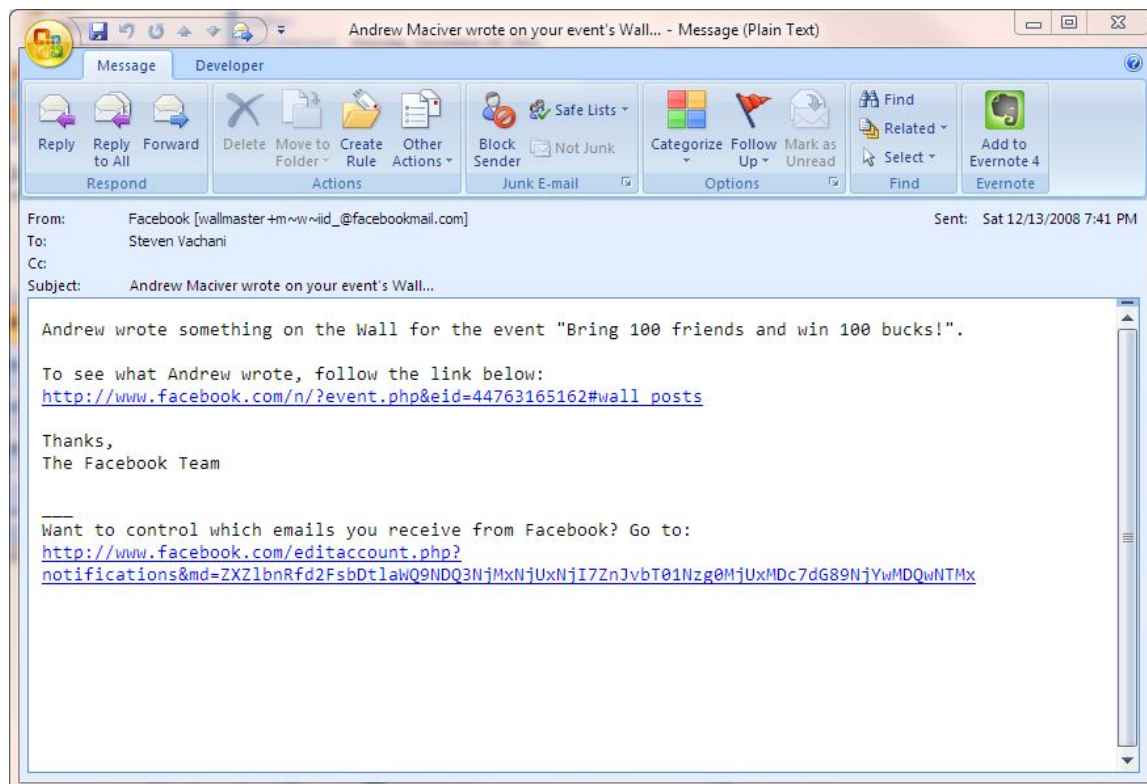


Figure 4: Screenshots of emails sent as a result of creating a Facebook Wall post and Facebook Event to invite friends to join Power 100 campaign



42. We also found another promotional message authored by the Defendants in the same resource file referenced above that was also used to invite Facebook friends to Power. *See* Exhibit E, at lines 147-149.

```
147 <data name="INVITEMESSAGE" xml:space="preserve">
148 <value>Hi ##friendname##,#BREAK#How would you
like all your friends in just one place?#BREAK#Login
to Power.com to discover all of its advantages and
enhance your Internet experience.</value>
149 </data>
```

43. This message includes a placeholder to insert a “friendname.” In this case, we were able to find the Power.com software that would initiate sending these messages. The function that uses this “INVITEMESSAGE” string is named “SendMessageInviteToPower().” *See* Exhibit F, `PowerCallback.aspx.cs`, found in the directory `SVN\power.com\Power.Com\Pub\Http`, at line 2623. The code excerpt below shows that the “INVITEMESSAGE” is used to form the body of the message to be sent as part of the invitation (see Exhibit F, at line 2681):

```
dataMessage.BodyMessage = Translate( "INVITEMESSAGE" )
.Replace( "##name##", name )
.Replace( "##friendname##", friendName )
```

44. This line of code retrieves the appropriate language translation for the “INVITEMESSAGE” (English, Spanish, or Portuguese) message, and then replaces the “friendname” placeholder in the text of the message that is sent with the actual friend’s name in order to complete the content of the invitation to join Power.com. *See* Exhibit F, at line 2716, it calls the following function to send the message:

```
PowerMessageManager.SendMessage( dataMessage );
```

45. How the invitation is sent depends upon the network (e.g. Facebook) to which the invited friend belongs. The `PowerMessageManager.SendMessage( )` method, which can be used to send invitations to users on Facebook, can be found starting at line 24 in the

`PowerMessageManager.cs` file found in the directory

`SVN\power.com\Power.Message.Core`, which is attached hereto as Exhibit G. The related `SendMessage()` code is responsible for calling the

`PowerMessageFactory.CreatePowerMessage()`, see Exhibit G, at line 42.

Further, a `CreatePowerMessage()` method that appears in the code uses the relevant network name (e.g. "Facebook") to determine how and where to send the electronic invitation. For the case where the network is Facebook, the following code would be executed (see Exhibit H, `PowerMessageFactory.cs`, found in the directory

`SVN\power.com\Power.Message.Core`, at lines 45-50). This code shows Defendants would actually send an electronic message to someone from Facebook inviting them to join the Power.com website. The code to send the message uses a `PowerScript` which posts the message to the Facebook Wall of the friend to be invited. The code to retrieve and execute the `PowerScript` can be found in Exhibit I, `Write.cs`, found in the directory `SVN\power.com\Power.Message.Core\Engines`, at lines 87-94.

46. The code identifies the name of the `PowerScript` `PN_SEND_SCRAP_FACEBOOK` as that which was used for initiating the electronic invitations to join Power.com. The code was retrieved from a database where it was added by using the following SQL command (see Exhibit J, file `InsertMessageScript.sql`, found in directory `SVN\power.com\Power.Message.Core\Database`, at line 7). The `PN_SEND_SCRAP_FACEBOOK` script itself was retrieved from the `PowerScript` database (see Exhibit K, file `PN_SEND_SCRAP_FACEBOOK.xml`, at lines 1-23).

47. The `PowerScript` automatically posts the message content from the `INVITEMESSAGE` string to the Wall of a Facebook friend. Using these automatically generated messages, Defendants initiated electronic invitations for Facebook users to join the Power.com website.

### **C. POWER DATABASES**

48. In addition to the code analysis, we also examined the related databases provided in an effort

to determine how many Facebook Event or Wall electronic mail messages were initiated by the PowerScript software. We determined that while certain of the databases were the ones of interest in which we would have expected to locate information about the numbers of electronic invitations that were sent by Power.com to Facebook, the databases produced by Defendants that should contain logs of the number of Events and Power.com invitations sent actually do not contain the information for the time period in question.

49. For instance, the Power.com database named Async is a log of PowerScript jobs run. The Async log would contain the information related to the number of electronic messages sent by the PowerScript software. The Async database found on the SQL 7 DVD only logged jobs from 2/19/2011 to 4/1/2011, and the Async database in SQL 6 DVD was corrupted. However, the disk that was provided that fixed the corrupted version only included logs from 08/03/2007 to 11/23/2008 – which does not cover the December 2008 period when the Facebook activity was seen. We understand that, according to information received from Mr. Timothy Fisher, Defendants stopped logging the PowerScript transactions into the database in November of 2008 as a result of migration of the company's servers to amazon.com as a host for the website. Whether true or not, the loss of information is prejudicial to Facebook, as only Defendants ever maintained such database logs.
50. In addition, we reviewed the content of the Power\_Logger database in the expectation that it might include the information about the number of Facebook Events and Wall messages that the PowerScript software initiated. We did so because this database appears to include tables to log information about messages sent, including 10 MessageLog tables, a MessageLogHistory table, 10 Scraplog tables, and a ScraplogHistory table. Nonetheless, all of these tables were empty except for the ScrapLoghistory, which only had 141 entries from 12/6/2009 to 11/9/2010, all on the Orkut network.
51. Again, we understand that based on information received from Mr. Fisher, Defendants ceased daily operations sometime in April of 2011, at which time Defendants transferred all files onto a separate backup service. We further understand that, according to Mr. Fisher, the

Power\_Logger database was supposedly too large to transfer, and therefore was removed. In our opinion, by deleting the Power\_Logger database, Defendants effectively erased arguably the most relevant and useful information concerning the number of electronic mail messages that Defendants initiated through execution of their PowerScript software associated with the 100x100x100 campaign.

52. Because the information about Events and Wall messages sent to Facebook during December of 2008 was not included in the databases we received from Power, we were unable to determine precisely how many wall messages were posted and how many “Power 100” campaign Event notifications actually were sent to Facebook users.
53. However, we also examined the Power database of the Power website’s users, and we were able to determine that there were at least 39,137 Power.com users with Facebook accounts in the database. These database records include the stored email addresses used by the Power.com users in order to login on Facebook, and the stored passwords for their Facebook accounts.

#### **D. DEFENDANTS’ EFFORTS TO CIRCUMVENT IP BLOCKS**

54. We have found that the Power.com website utilized a pool of proxy servers to connect with social network sites, including Facebook, through different IP addresses. The Power software allowed the Defendants to configure a list of proxy servers for each social network site (see Exhibit L, file `HttpProxyConfig.cs`, found in the directory `SVN\powerinfra\Projectos\Power.PowerNetwork.Core\bll`, lines 107-141).
55. In one of the databases provided by Defendants, we were able to find an entry for the proxy server used to access Facebook. The IP address for the server was 174.129.224.81, and a reverse directory lookup of this IP address identifies the host as `ec2-174-129-224-81.compute-1.amazonaws.com`. This IP address is associated with Amazon Web Services (see Exhibit M, file `AsyncSetup AsyncHttpProxy.csv`, extracted from the

database SQL 7\AsyncSetup\_full\_bkp.bak, database AsyncSetup, table: AsyncHttpProxy, row: 1). However, since the database only included a single IP address, and we understand that there were other IP addresses that Facebook attempted to block in December of 2008, it is clear this is not a complete list of the IP addresses that Defendants used to access Facebook. Additionally, the database did not include any history of which IP addresses were used for the critical time period of December of 2008 prior to when Defendants switched to Amazon Web Services. Based upon the proxy system software, it is clear that the Defendants could remove servers from service and replace servers both manually and automatically to circumvent IP blocks, such as those employed by Facebook.

56. The Defendants' software includes a command processing system to manage the server pool (see Exhibit N, `ServerManager.java` found in the directory `SVN\powerinfra\trunk\Java\powerproxy\com\powerscrap\proxy\manager`, lines 43-84). This command processing system is used to check status and make changes to any of the servers in the pool which may be blocked by a website such as Facebook, ("BLOCK SERVER") and to obtain a new server IP address when such a block is detected ("GETNEXTIP"). The commands can be issued either programmatically or manually. The command processing system effectively permitted Defendants to circumvent any attempts by websites like Facebook to block access by Defendants to those websites.
57. We also uncovered further evidence that Defendants implemented technology to circumvent Facebook's efforts to block the Power.com website by tracing the execution of the software used to create Facebook Events. Specifically, the latest delivery included the source code files that run the `CREATE_EVENT_FACEBOOK` script (see Exhibit O, `CreateCampaignEvent.cs` from directory `SVN\power.com\Power.Com.Core\Campaign100x100x100`, at lines 25-40. In this code, the `PowerScript` retrieved and executed the "CREATE\_EVENT\_FACEBOOK" script from one of Defendants' servers. Significantly, the IP address of the relevant server that

executes the “CREATE\_EVENT\_FACEBOOK” script is set by the Defendants’ proxy server software. This functionality shows that the PowerScript software is intentionally monitored by the Power.com system to ensure that it is not being blocked by Facebook as a result of the software creating Facebook Events.

58. Additionally, we investigated certain routines in Defendants’ source code to determine whether Defendants employed tools that allowed Defendants to circumvent technical barriers – such as blocks of IP addresses – that Facebook or other websites put in place to block Power’s access to their own websites. Certain ones of these routines create a list of proxy servers, which are continuously monitored to determine, among other matters, if they are blocked by a website like Facebook. We have been able to identify connection-type methods in the source code that allow Defendants to use a proxy server to change the IP addresses used by the Power.com website that are visible to and are detected by third parties like Facebook. By tracing the execution of a PowerScript, we found that part of the process was to use `ConfigurationPowerProxy` to get a proxy server to use for connecting with Facebook. The code found shows how an array of proxy servers is created from a list provided by the proxy manager and then the server is selected randomly from that list. See Exhibit P, `ConfigurationPowerProxy.cs` found in the directory, `SVN\powerinfra\trunk\Projetos\src\configuration`, at lines 20-26.

59. The Defendants’ source code includes routines we have identified that create a list of proxy servers, which are continuously monitored to determine, among other matters, if they are blocked by Facebook. The `updateServerListThread` shows the server list is updated on a regular interval stored in the `timeToUpdate` property (see Exhibit Q, `UpdateServerListManager.java`, found in the directory `SVN\powerinfra\trunk\Java\PowerInfra\powerproxy\com\powerscrap\proxy\manager`, at lines 107-118).

60. While the previous routine is used to update the server list on regular intervals, there are two other methods that are used to update the server list. The `definirServidor` method is

used to add a server to the list. The `removeServer` method is used to remove a server from the list (see Exhibit R, `PowerProxy.java`, found in the directory `SVN\powerinfra\trunk\Java\PowerInfra\powerproxy\com\powerscrap\proxy`, at lines 82-108 and lines 112-135, respectively). Finally the `listen` method at Exhibit R, lines 144-165 monitors each proxy server and calls the `removeServer` routine if it detects a block of the Power.com website. The IP address of the Power.com website can then be replaced with another IP address from the Power Proxy Manager. In this way, Defendants ensure that they can circumvent deliberate blocks of its services by entities such as Facebook.

61. Based on the code examined it is clear that significant effort went into the design and development of the proxy system, and that one of the objectives of the system was to reconfigure IP connections if one of Defendants' proxy server's IP addresses used to connect to a website like Facebook was blocked. From our own understanding of the technology, we know that it is common for entities like Power.com to employ proxy pools to circumvent the blocking of IP addresses, especially when such entities are also employing scraping programs to obtain web content. As shown in our analysis above, the PowerScript scripts used by Power to create Facebook Events and write on Facebook friends' Walls are such web scraping programs. Moreover, Defendants' proxy pool infrastructure was designed to support these scraping activities.
62. Starting with the random selection of a proxy server to run each PowerScript, through the server list maintenance software described above, to the pool management command software and proxy server monitoring code also discussed above; Defendants' proxy system clearly was specifically designed to circumvent IP address blocking by entities such as Facebook.

#### **E. DEFENDANTS HAVE DELETED IMPORTANT DATA**

63. Since first getting access to some code on August 23, 2011, we have continually found

deficiencies in the scope of code produced by Defendants. For instance, as noted, despite repeated and diligent requests, we still have not received all of the Power database information associated with how many invitations were sent by Power. From correspondence from Mr. Fisher, we now believe this highly important information was deleted after this litigation was underway.

## F. TECHNICAL ANALYSIS OF DECLARATION OF MR. VACHANI

64. Finally, we offer some observations about the obvious technical errors contained in statements by Defendant Steve Vachani in his December 12, 2011 Declaration. For instance, in paragraph 3 of Mr. Vachani's declaration, he states:

Specifically, Power created a browser that allowed users to login and access all of their various social networking accounts at once. Users could update their photos, messages, music, and videos, and these updates would be portable across various social networking sites.

65. We believe Mr. Vachani's statements reflect his lack of technical acuity and programming skills to functionality understand the functionality of the PowerScript software. From our

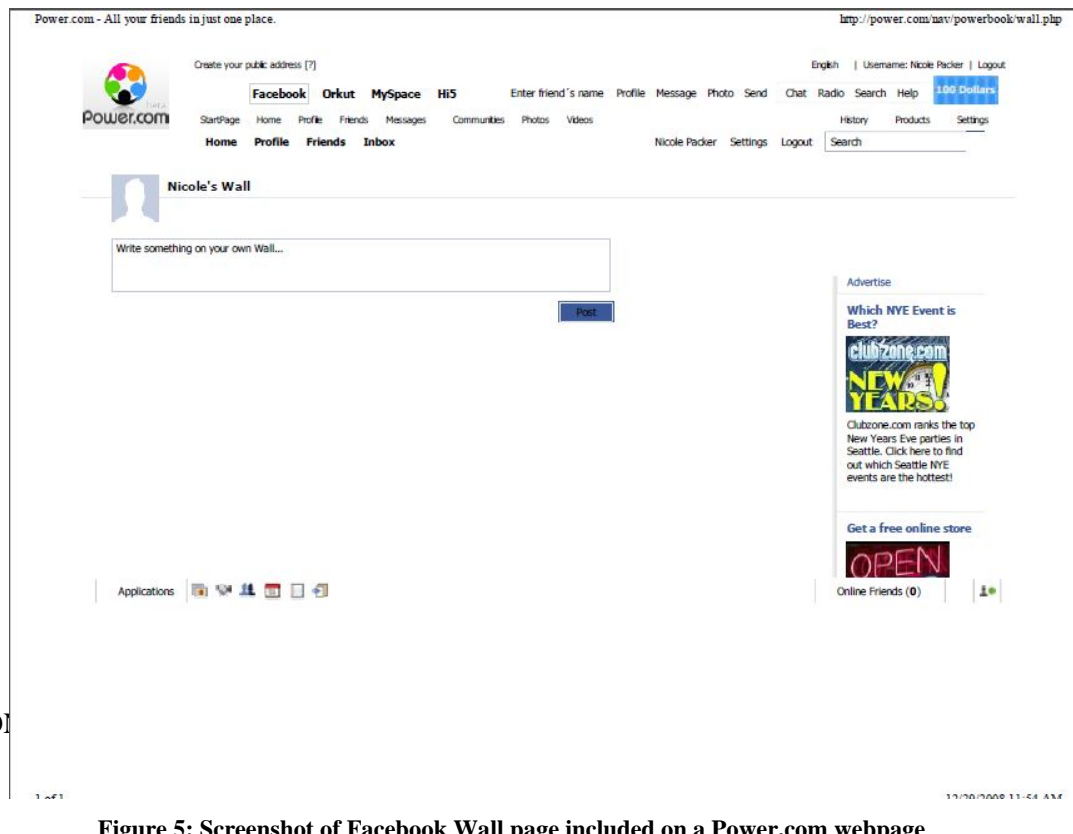


Figure 5: Screenshot of Facebook Wall page included on a Power.com webpage



examination of the code, we did find that Defendants' software included a function that does resemble a browser – but only slightly. That software is contained in one of the many software directory trees and is named "Navigator." The software provided the user with the ability to open another web page and display it inside a Power.com web page. In Figure 5, a screenshot of the Power.com web page with a Facebook page embedded is shown (*see* FBPOWER00099). The screenshot, we believe reflects the functionality Mr. Vachani is referring to in his statement. However, while one function of this software was to allow the user to enter a message, the description of it as a "browser" does not capture the software's programmed crawling and scraping of websites. The Power software that provides this functionality is the "PowerScript" software, scripts, and infrastructure. As we have shown in our analysis above, PowerScripts were written to programmatically perform all the functions required to get and save photos, get and send messages, and get and save video, so as to "proxy" a website like Facebook. This functionality is directly related to a web scraper or webbot, and not a browser. That is so because the program or scripts perform the operation, rather than a user.

66. Also in paragraph 22 of his December 12, 2011 Declaration, Mr. Vachani states:

Power did not access any nonpublic portion of Facebook's website. Power merely offered users a different and potentially superior browser through which they could access their Facebook accounts to copy, update, and/or port their own "User Content." And users did so by entering their own valid usernames and passwords, which Power never copied or stored for any purpose. Power did not obtain any software, data, or other content of value from Facebook. The only data accessed through Power's utilities were user's own "User Content," over which Facebook has disclaimed any ownership.

67. Again this statement is misleading because it represents that the user was controlling the access to public portions of Facebook's website. What actually occurred is that Defendants' software programmatically created Facebook Events. Unlike a browser, Defendants' software can programmatically create an Event, creates the list of friends to invite, and execute or send the Event invitations, without requiring any user interaction.

68. In addition, Mr. Vachani incorrectly states that Power never copied or stored Facebook usernames and passwords, whereas our examination of the “power” database found 39,137 Facebook login names and passwords stored there. An example of three network connections for one Power.com user is shown in Table 2. As can be seen from the table headings, this user belonged to three social networks: Facebook, LinkedIn, and Orkut. It also shows the username and password for each was stored within Defendants’ databases. See power database, dbo.account table.

id	iduser	Nameaccountnetwork	username	idnetwork	password
17243056	977586	FACEBOOK	luiz.grecco@gmail.com	NULL	giF9l6JMQK8=
17134637	977586	LINKEDIN	luizg@sebraesp.com.br	1288243	q5HQ0dzE0bo=
906629	977586	ORKUT	luiz.grecco@gmail.com	1.35E+19	giF9l6JMQK8=

**Table 2: List of three social network accounts, usernames and passwords stored in power database**

69. In the same “power” database, we also found that friend lists were also stored. We found 225 records of Facebook friend lists that totaled 31,515 Facebook friends. An example of one of the 225 Facebook friend lists can be found in Exhibit S, friendlist2.xml from the power database, dbo.FriendsAccount table. This example friend list contains data for 253 Facebook friends and stores their Facebook IDs, Names and links to their Facebook profile photos.

70. Finally, in paragraph 11 of Mr. Vachani’s December 12, 2011 declaration, he states:

Power did not undertake any effort to circumvent that block, and did not provide users with any tools designed to circumvent it. Nevertheless, Facebook’s IP block was ineffective because it blocked only one outdated IP address Power had used, and did not block other IPs that Power was using in the normal course of business.

71. From our analysis of the Power Proxy infrastructure, Defendants developed a flexible system for operating, managing, and maintaining a pool of proxy servers that could be assigned and removed from use easily. Because Defendants fundamentally relied on their software’s ability to scrape information from other sites, the Power Proxy infrastructure limited the number of transactions coming from any one proxy server to reduce the likelihood of

detection by the websites being scraped. Defendants also put in place monitors to detect when errors occurred on one of the proxy servers, which included the ability to remove a failed proxy server from the list of servers. This type of proxy pool is not commonly used by websites, but is commonly used by web scraping services.

## **G. CONCLUSION**

72. Based upon the review of Defendants' source code for various code projects named PowerScript, PowerNavigator, PowerProxy, and spider, as well as other documentation produced to date, we have concluded the following:

(a) Defendants developed proprietary software named PowerScript and spider in order to crawl various social network websites, including particularly [www.facebook.com](http://www.facebook.com), to extract or "scrape" website user information such as Facebook photo images, wall content, friends' lists, and the like, and to then reformat that user information on Defendants' own website, [www.power.com](http://www.power.com), in order to "proxy" Facebook and permit Defendants' own website users to log into Facebook through Defendants' own Graphical User Interface, rather than through Facebook's interface.

(b) Defendants designed their proprietary PowerScript and spider software to automatically post on the Facebook website new Events soliciting Facebook users to join Power.com as part of what Defendants called the "Power 100" or "100x100x100" Campaign. Defendants likewise designed their software to automatically post Power Invitations on Facebook users' Walls soliciting them to join Power.com.

(c) Based upon available information from Defendants' databases, at least 39,137 users of the Power website also had Facebook accounts. Because of missing information from those databases that is solely in the control of Defendants, we were unable to quantify exactly how many Facebook Event or wall posting transactions took place between the Power website and Facebook in which Facebook users were solicited to join Power.com. We are able to state that both kinds of solicitations did occur, however, and were initiated by

Defendants' proprietary software.

(d) In addition to the electronic mail communications that Defendants' software automatically posted on the Facebook websites when it created Facebook Events and when it posted Facebook wall messages, the same proprietary software that Defendants used to automatically create Event notifications and post Facebook Wall messages also would initiate automated "spam" email messages being sent on Defendants' behalf to Facebook.

73. It is our understanding that discovery in this case is ongoing. Accordingly, we reserve the right to supplement or amend our opinions in light of any additional evidence, testimony, or information that may be provided to us after the date of this report. We also reserve the right to supplement or amend our opinions in response to any expert reports served by any other party in the lawsuit.

Dated: 19-Dec-2011



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Robert Zeidman

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Lawrence Melling

Defendants' proprietary software.

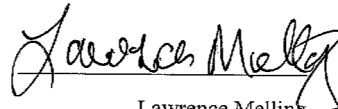
(d) In addition to the electronic mail communications that Defendants' software automatically posted on the Facebook websites when it created Facebook Events and when it posted Facebook wall messages, the same proprietary software that Defendants used to automatically create Event notifications and post Facebook Wall messages also would initiate automated "spam" email messages being sent on Defendants' behalf to Facebook.

73. It is our understanding that discovery in this case is ongoing. Accordingly, we reserve the right to supplement or amend our opinions in light of any additional evidence, testimony, or information that may be provided to us after the date of this report. We also reserve the right to supplement or amend our opinions in response to any expert reports served by any other party in the lawsuit.

Dated: 19-Dec-2011

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Robert Zeidman



Lawrence Melling

CONFIDENTIAL

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- Exhibit A: Resume of Robert Zeidman**
- Exhibit B: Larry Melling Resume**
- Exhibit C: Expert Report Source Code Inspection Log 2011-12-19**
- Exhibit D: CREATE\_EVENT\_FACEBOOK.xml**
- Exhibit E: PowerCallBack.aspx.en.resx**
- Exhibit F: PowerCallBack.aspx.cs**
- Exhibit G: PowerMessageManager.cs**
- Exhibit H: PowerMessageFactory.cs**
- Exhibit I: Write.cs**
- Exhibit J: InsertMessageScript.sql**
- Exhibit K: PN\_SEND\_SCRAP\_FACEBOOK.xml**
- Exhibit L: HttpProxyConfig.cs**
- Exhibit M: AsyncSetup AsyncHttpProxy.csv**
- Exhibit N: ServerManager.java**
- Exhibit O: CreateCampaignEvent.cs**
- Exhibit P: ConfigurationPowerProxy.cs**
- Exhibit Q: UpdateServerListManager.java**
- Exhibit R: PowerProxy.java**
- Exhibit S: friendList2.xml**

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Attorneys for Plaintiff  
FACEBOOK, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC. a Cayman Island  
corporation, STEVE VACHANI, an individual;  
DOE 1, d/b/a POWER.COM, DOES 2-25,  
inclusive,

Defendants.

Case No. 5:08-cv-05780-LHK

**STIPULATION AND [PROPOSED]  
ORDER, PURSUANT TO CIVIL  
LOCAL RULE 7-12, TO FILE  
PREVIOUSLY LODGED MATERIAL  
AND UNSEAL PREVIOUSLY SEALED  
MATERIALS**

Dept: Courtroom 8, 4th Floor  
Judge: Hon. Judge Lucy H. Koh

This Stipulation is entered into and between Plaintiff Facebook, Inc. ("Facebook"), and Defendants Power Ventures, Inc. and Steven Vachani ("Defendants"). It is hereby stipulated and agreed, pursuant to Civil Local Rule 7-12, that subject to approval of the Court:

1. The Expert Report of Bob Zeidman and Lawrence Melling, previously lodged with and considered by the Court, shall be formally filed so that it may be considered by the Ninth Circuit as part of the record on appeal.

2. For the convenience of the Ninth Circuit, the parties, and the public, certain materials previously sealed by this Court shall now be unsealed: Dkt. Nos. 213-2, 213-4, 217 (main declaration only), 300-1, and 372, as well as the Expert Report of Bob Zeidman and Lawrence Melling (main report only).

Dated: May 28, 2014

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ I. Neel Chatterjee*

I Neel Chatterjee  
Attorney for Plaintiff  
FACEBOOK, INC.

Dated: May 28, 2014

AROPLEX LAW

*/s/ Amy Sommer Anderson*

Amy Sommer Anderson  
Attorney for Defendant  
POWER VENTURES, INC.

Dated: May 28, 2014

*/s/ Steven Vachani*

Steven Vachani  
*Pro Se* Defendant

**Filer's Attestation:** Pursuant to General Order No. 45, §X(B), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from its signatories.

Dated: May 28, 2014

*/s/ I. Neel Chatterjee*

I Neel Chatterjee



1 PURSUANT TO STIPULATION, IT IS SO ORDERED:

2 DATED: May 29, 2014

3   
LUCY KOH  
United States District Judge

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 5, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ I. Neel Chatterjee*

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I. Neel Chatterjee

*Attorney for Plaintiff-Appellee*